Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CE DESIGN, LIMITED, AN ILLINOIS CORPORATION, INDIVIDUALLY AND AS THE REPRESENTATIVE OF A CLASS OF SIMILARLY SITUATED PERSONS, PETITIONER

v.

PRISM BUSINESS MEDIA, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the courts below err in ruling that the jurisdiction-stripping provisions of 28 U.S.C. § 2342 (the "Hobbs Act") and 47 U.S.C. § 402(a) require federal courts to apply FCC agency commentary that is contrary to the clear and unambiguous language of the statute the agency is supposed to implement?

II. Is the proper result of a federal court's lack of jurisdiction to "review" or "invalidate" a final order of the FCC under the Hobbs Act a ruling on the merits of the dispute in which the court resolves a conflict between the agency order and the statute in favor of the former?

RULE 29.6

CE Design Limited does not have any parent corporations, and no publicly held companies own 10% or more of the corporation's stock.

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JURISDICTION

The United States Circuit Court of Appeals issued its Memorandum Order and Judgment on May 27, 2010. Petitioner timely moved for rehearing and rehearing *en banc* on June 10, 2010. The Seventh Circuit issued an order denying rehearing on July 26, 2010. This Court therefore has jurisdiction to review the Memorandum Order and Judgment pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 11, 12 and 13.

RELEVANT PROVISIONS INVOLVED

(see appendix)

STATEMENT

This is an action for damages under the TCPA arising out of the transmission of an unsolicited fax advertisement from Prism to CE Design. Prism admits that it never contacted CE Design to request express invitation or permission to send CE Design advertisements by fax prior to the transmission complained of.

At the time Prism sent the fax advertisement, CE Design subscribed to several of Prism's print

magazines. Prism's only defense to liability under the TCPA is its two-part contention (1) that language in the FCC's 1992 Rules exempts from liability the sender of a fax transmitted to a recipient with which the sender has an "existing business relationship" ("EBR") and (2) that Prism had an "existing business relationship" with CE Design at the time it faxed the advertisement at issue.

Prism moved for summary judgment on these contentions, arguing that the Hobbs Act stripped the district court of jurisdiction to do anything other than apply dicta in the FCC's 1992 Rules, and that the dicta implicitly allowed fax senders and non-residential subscribers to have an "existing business relationship" permitting junk faxes. The district court granted Prism's motion for summary judgment, and denied CE Design's subsequent motion to alter or amend the judgment. CE Design appealed and the Seventh Circuit affirmed the judgment.

The district court has jurisdiction of this matter pursuant to both 28 U.S.C § 1331 and 28 U.S.C. § 1332(d).

The district court had jurisdiction under § 1331 because CE Design Ltd's claim under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, arises under federal law. *See Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 451 (7th Cir. 2005).

The district court also had jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), because the case is a class action, CE Design is an Illinois corporation with a principal place of business

in Illinois, Prism is a Delaware corporation with a principal place of business in New York. and there is a reasonable probability that the claimed damages exceed $5 million. *See Brill*, 427 F.3d at 449.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's holding undermines basic principles of statutory interpretation.

Review by this Court is warranted because (1) the case involves questions of exceptional importance and (2) the Seventh Circuit's opinion conflicts with decisions of this Court and other Circuits that follow the *Chevron* approach to statutory interpretation even when dealing with an order by the FCC. The Seventh Circuit's refusal to apply clear, unambiguous statutory language to a statutory claim upends centuries of administrative law. It uses the jurisdiction-stripping provisions of the Hobbs Act to justify elevating agency interpretive commentary into a statement of the law.

In so doing, the opinion casts doubt on hundreds of decisions in statutory interpretation cases, as well as serving to enshrine the Federal Communications Commission's ("FCC") commentary at issue in this case in the law despite having been rejected by Congress at the time the statute was enacted. The Seventh Circuit's decision thus undermines well-settled principles on the interpretation and application of federal statutes and means that a litigant is not permitted to rely on the plain language of an unambiguous statute.

The holding that the Federal Administrative Orders Review Act, 28 U.S.C. § 2342, (the "Hobbs Act") acts to

foist erroneous agency interpretations of unambiguous statutes onto federal courts conflicts with numerous cases decided by the United States Supreme Court, including *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 550 U.S. 45 (2007), *BedRoc Ltd., LLC v. United States*, 541 U.S. 176 (2004), *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992), *Hughey v. United States*, 495 U.S. 411 (1990), and *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979). It also conflicts with decisions by other federal courts of appeals, including *Satterfield v. Simon & Schuster, Inc.*, 569 F. 3d 946 (9th Cir. 2009), *Core Commc'ns, Inc. v. Verizon Pa., Inc.*, 493 F. 3d 333 (3d Cir. 2007), *Robinson v. United States*, 335 F.3d 1365 (Fed. Cir. 2003), *Ins. Co. of N. Am. v. Gee*, 702 F.2d 411 (2d Cir. 1983), and *Meade v. Twp. v. Andrus*, 695 F.2d 1006 (6th Cir. 1982).

The Seventh Circuit recognized that this case presents a conflict between a statute's plain language and an administrative agency interpretation creating a new exemption to that statute. It concluded that the Hobbs Act precludes courts from applying the statute as written, instead forcing them to apply the contradictory agency interpretation as the governing law. It made no attempt to consider the statute and whether or not it was ambiguous.

This approach conflicts with basic canons of statutory interpretation. This Court has explained: "We have stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. ... When the words of a statute are unambiguous, then

this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). *See Sierra Club v. EPA*, 536 F. 3d 673, 680-81 (D.C. Cir. 2008) ("The plain meaning of the text controls; courts should not strain to find ambiguity in clarity; courts must ensure that agencies comply with the plain statutory text and not bypass *Chevron* step 1. And I strongly align myself with the majority's quotation from Justice Frankfurter about the best tool of statutory interpretation: "(1) Read the statute; (2) read the statute; (3) read the statute!") (*in dissent*).

For the first time, the Seventh Circuit departs from this principle in applying the jurisdiction-limiting provisions of the Hobbs Act. Nowhere in either the Seventh Circuit's opinion or in any of the cases on which it relies is a discussion of why any interpretive aids are required to apply the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* The Seventh Circuit holds that the mere fact that Prism proffered the FCC interpretive language as a defense automatically placed the validity of the FCC Order containing it at issue, and because a Court lacks jurisdiction to issue an order invalidating an FCC order other than under the circumstance proscribed by the Hobbs Act, the Court was bound to apply the interpretation as though it were itself law.

This approach would radically alter administrative law, as it is contrary to the long line of authority holding that interpretive aids—agency interpretations included—are irrelevant to the question of interpretation of an unambiguous statute. Nor does this principle present an insoluble "chicken-and-an egg question" of which comes first, the Hobbs Act or step

one of *Chevron*. Opinion, p. 7. This Court has consistently held, including in *Chevron* itself, that nothing else matters when the statute is clear and unambiguous. *See Chevron*, 467 U.S. at 842-43 and n. 9 ("If the intent of Congress is clear, that is the end of the matter for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect") (internal citations omitted); *BedRoc*, 541 U.S. at 183 ("'The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous."), *quoting Connecticut Nat'l Bank*, 503 U.S. at 253-54.

The Seventh Circuit's "chicken and egg" discussion is troubling, because it means that the Hobbs Act is automatically invoked when an order by the FCC or another agency covered by the Hobbs Act that might have some bearing on any of the issues in a case exists. This, in turn, means that agency orders now apply to alter even unambiguous statutes. Here, only the FCC opinion opens the door to the Hobbs Act's jurisdictional bar. But if the statute is unambiguous, aids to construction, such as an agency interpretation, are not to be consulted.

The "chicken and egg" in this case is not "subject matter jurisdiction" versus "step one of Chevron," but "plain language" versus "agency opinion." Plain statutory language closes the door to agency interpretation, and that closes the door to any attempt to litigate the validity of the agency interpretation as the agency order is irrelevant to the question before the court. That, in turn, closes the door on any jurisdictional bar created by the Hobbs Act.

CE Design's argument was not that the Court needed to "put off" determining its jurisdiction. Indeed, the trial court clearly has jurisdiction of TCPA claims. Application of the Hobbs Act would *revoke* that jurisdiction. CE Design's argument was that the Hobbs Act did not apply because an administrative agency opinion was irrelevant when the statute is unambiguous. By stopping at the plain language, the Court never reaches the FCC opinion, and thus the jurisdictional bar of the Hobbs Act never becomes operative in this case.

The Seventh Circuit alternatively describes CE Design as advocating that the Court "invalidate" or "ignore" the FCC interpretation. But CE Design's position is that its claim is for violation of the TCPA, that the statute's clear and unambiguous language defines the nature of the offense, and that Prism has not proffered anything indicating that it is not liable under the statute's language.

In short, the FCC's interpretation of the relevant statutory language does not come up because the statutory interpretation question begins and ends with the plain and clear language of the statute. The

Court should "ignore" the FCC interpretation simply because it is not germane to the statutory analysis.

Thus, it is no surprise that this Court in *Global Crossing* and other federal appellate courts (notably the 9th Circuit in *Satterfield*), all have interpreted federal statutes under the traditional constructs where one party proffered an FCC interpretation of statutory language, affording the FCC interpretation no more and no less deference than any other agency regulation. Courts routinely apply standard statutory analysis in situations where an FCC regulation was proffered.

This Court recently adjudicated a dispute over whether a telephone carrier's violation of an FCC regulation requiring compensation to payphone operators and stating that a failure to provide such compensation was a violation of the Federal Communications Act of 1934's ("FCA") "just and reasonable" section was in fact such an FCA violation, allowing a private cause of action. *See Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 550 U.S. 45 (2007). In that case, the telephone carrier argued that the FCC regulation providing for the private cause of action was unlawful under the FCA. *Id.* at 54-55. In analyzing the claim, the Court first noted that "[i]nsofar as the statute's language is concerned, to violate a regulation that lawfully implements § 201(b)'s requirements *is* to violate the statute." *Id.* at 53. It went on to hold that:

> The difficult question, then, is not whether § 207 covers actions that complain of a violation of § 201(b) as lawfully implemented by an FCC regulation. It plainly does. **It remains for us to**

> **decide whether the particular FCC regulation before us lawfully implements § 201(b)'s "unreasonable practice" prohibition.**

Id. at 54-55 (emphasis added). The Court went on to apply the *Chevron* analysis to determine whether the regulation was lawful. *Id.* at 55-58. Notably, the Court did *not* hold that the Hobbs Act precluded judicial review because the suit was an ordinary lawsuit between the carrier and the payphone operator brought in a district court, as opposed to a Hobbs Act petition for review. *Id., generally.*

Likewise, the Ninth Circuit recently decided—on appeal of summary judgment in a putative class action—whether text messaging was a "call" under the automated calling provisions of the TCPA. *See Satterfield v. Simon & Schuster, Inc.*, 569 F. 3d 946 (9th Cir. June 19, 2009). That case turned, in part, on whether the definition of "call" in the FCC's 2003 Report and Order interpreting the TCPA was entitled to deference. *Id.* at 951-954. Rather than holding that the Hobbs Act says that the regulation is *per se* unquestionable, as the Seventh Circuit did here, the *Satterfield* court conducted the *Chevron* analysis and found that the TCPA left room for the FCC's action in that (1) the FCC was granted authority to make rules and regulations to implement the TCPA in 47 U.S.C. § 227(b)(2); (2) the TCPA did not define "call": and (3) that the FCC's interpretation of call was reasonable. *Id.* at 953-54.

In reaching its conclusions, the Ninth Circuit began its discussion by reciting the bedrock principle of

statutory interpretation: "The preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Id.* at 951, *quoting BedRoc*, 541 U.S. at 183.

With regard to the other issue involved in that case—whether the defendant was using an automated dialing system for TCPA purposes—the *Satterfield* court held: "Reviewing this statute, we conclude that the statutory text is clear and unambiguous." *Id.* This approach is consistent with this Court's dictates *Chevron* and its progeny.

Numerous other courts have likewise applied standard statutory analysis to FCC orders. *See, e.g., In re Airadigm Commc'ns, Inc.*, 519 F. 3d 640, 652-55 & n. 2 (7th Cir. 2008) (bankruptcy code trumps FCC regulations); *McCarty*, 362 F. 3d 378; *Fedor v. Cingular Wireless Corp.*, 355 F. 3d 1069, 1072-73 (7th Cir. 2004); *Verizon New England, Inc. v. Maine Public Util. Com'n*, 509 F. 3d 1, 11 (1st Cir. 2007) ("Although statutory interpretations are the business of courts, the FCC's view would normally receive *Chevron* deference"); *Global NAPS, Inc. v. Verizon New England, Inc.*, 505 F. 3d 43, 47 (1st Cir. 2007); *TCG New York, Inc. v. City of White Plains*, 305 F. 3d 67, 75-76 (2d Cir. 2002) ("Although we do not reach the issue of whether the statute is sufficiently clear to eliminate the need for deference, we agree that the relevant FCC decisions are not controlling."); *A T & T Corp. v. JMC Telecom, LLC*, 470 F. 3d 525, 534 (3d Cir. 2006); *Core Commc'ns*, 493 F. 3d 333; *Verizon Maryland, Inc. v.*

Global NAPS, Inc., 377 F. 3d 355, 381-82 (4th Cir. 2004) (in dissent); *MCI Telecommn's Corp. v. Ohio Bell Tel. Co.*, 376 F. 3d 539, 550 (6th Cir. 2004); *Ace Tel. Ass'n v. Koppendrayer*, 432 F. 3d 876, 881-82 (8th Cir. 2005); *SW Bell Tel. Co. v. Connect Comm'n Corp.*, 225 F. 3d 942, 946 (8th Cir. 2000) ("We must defer to the FCC's view so long as it is a reasonable interpretation of an ambiguous statute."); *see also CBS Broad., Inc. v. EchoStar Commc'ns Corp.*, 450 F. 3d 505, 520 n. 27 (11th Cir. 2006) (denying *Chevron*-based argument against giving deference to FCC order because argument waived by party). As these cases demonstrate, a Court's interpretation of statutory language of which the FCC has proffered an interpretation is both proper and commonplace.

The Seventh Circuit does not explain why these cases fail to support the commonsense conclusion that federal courts should approach their statutory interpretation task no differently when there is an FCC regulation lurking in the background than it does at other times. Contrary to the Seventh Circuit's assertion (opinion, p. 12), *McCarty* and *Sprint Spectrum v. State Corp. Comm'n* , 149 F. 3d 1058 (10th Cir. 1998), *did* involve FCC rules. *See McCarty*, 362 F. 3d at 386-87, *citing Chevron*; *Sprint Spectrum*, 149 F. 3d at 1061-62, *citing Chevron*.

To say that *Airadigm* and *Fedor* "involved the application—rather than the validity—of FCC rules" (opinion, p. 12) is a distinction without a difference. Like this one, those cases involve situations where one party sets up an FCC order to support its position in the litigation. *Fedor* involved a situation where this Court evaluated certain FCC opinions in the context of

evaluating the parties' claims and elected to give the opinions deference, citing *Chevron*. To the extent that is an "applicability" issue as opposed to a "validity" issue, so is this case: the interpretive language in question does not apply because the statute is clear and ambiguous.

In *Airadigm*, FCC regulations were set up against provisions of the federal bankruptcy code. The Seventh Circuit held: "The issue before the Court is what to make of the FCC's regulations for purposes of the bankruptcy code....In the event that the FCC has issued regulations that conflict with the requirements of the bankruptcy code, *NextWave* commands that the former give way....The bankruptcy code governs due to the time-honored rule of legislative supremacy." *In re Airadigm*, 519 F. 3d at 654, citing *FCC v. NextWave Personal Communications, Inc. v.* 537 U.S. 293, 302-03 (2003). There is no reason why Prism's Hobbs Act argument would not have applied with the same force in *Airadigm*, or why the "time-honored rule of legislative supremacy" does not put the TCPA before the regulation here.

Next, the Seventh Circuit limits this Court's holdings in *Global Crossing* and the Third Circuit's holding in *Core Communications* to questions of FCC pronouncements concerning federal court jurisdiction. (Opinion, p. 13). The Seventh Circuit does not explain why its view of the Hobbs Act would not apply to those pronouncements even as it applies to the one at issue here. Certainly nothing in the Hobbs Act indicates that final orders of the FCC that define a litigant's access to the federal courts are excluded from the provisions of that statute. This reasoning is doubly curious because

the Seventh Circuit's basis for dismissing these decisions was "[t]he respective courts looked to *Chevron* only to answer threshold questions...," only five pages after basing its holding in the instant case on the fact that an Article III court's jurisdiction is such a threshold question. (Opinion, pp. 7-8, 13).

At any rate, neither *Global Crossing* nor *Core Communications* is so limited. *Global Crossing* was a civil dispute where the parties contested the issue of whether a telephone carrier's violation of an FCC regulation requiring compensation to payphone operators and stating that a failure to provide such compensation was a violation of the Federal Communications Act of 1934's ("FCA") "just and reasonable" section, was such an FCA violation. 550 U.S. at 47. This Court held that its task in the case was "to decide whether the particular FCC regulation before us lawfully implements § 201(b)'s 'unreasonable practice' prohibition." *Id.* at 54-55.

While it is true that the fight in *Global Crossing* was over whether the plaintiff stated a claim for violation of the FCA, which can be cast as the FCC attempting to expand the jurisdiction of the district courts (opinion, p. 13), that is no different than the case at bar. Here, the fight is over whether CE Design has stated and proved a claim for violation of the TCPA. While in that case the FCC provided the plaintiff its sword, here it allegedly provided Prism its shield.

Thus, the FCC interpretation at bar, under the Seventh Circuit's characterizations, is a "situation where the FCC attempted to ... limit ... the jurisdiction of the district courts." Opinion, p. 13. This is also what

the Seventh Circuit claims *Core Communications* was about. *Id.* In that case, the defendant pointed the court to an FCC order that, it argued, required administrative exhaustion prior to bringing suit. *See Core Communications*, 493 F. 3d at 338-39. In other words, the FCC created an exhaustion defense, the defendant argued it, and the plaintiff argued that the regulation should not be deferred to. That is precisely the situation here. The Third Circuit reached and considered the issue under traditional statutory analysis rather than pointing to the Hobbs Act and applying the regulation without consulting the statute.

The Seventh Circuit acknowledges that *Satterfield* involves the same issue as this case—down to the same regulations—but dismissed it because it used standard statutory analysis and did not discuss the Hobbs Act. Opinion, p. 13. Ultimately, that is the issue with all of the cases; none takes the time to reject the argument that the Hobbs Act inverts the task of statutory construction and makes a regulation relevant and controlling where it would not otherwise be. By the same token, however, none of the cases on which the Seventh Circuit relies holds that the Hobbs Act *does* require a court to consider a regulation before it considers statutory language or that it makes regulations germane to statutory analysis where they otherwise would not be.

Rather, the Seventh Circuit relies on cases that uniformly involve the situation where an FCC regulation *is* relevant to the determination the Court is asked to make (as opposed to a mere statutory interpretation offered where none is necessary). These cases involve: (1) litigation directly against the

regulatory agency; (2) litigation seeking an injunction halting the enforcement of a regulatory order; (3) litigation challenging the procedures applied by the FCC in reaching an order rather than on the merits of the order; or (4) litigation in which a regulation or the enforcement of a regulation, rather than application of a statute, was central to the claim.

In *City of Peoria v. GECCO*, 690 F. 2d 116 (7th Cir. 1982), the parties collusively sought an injunction invalidating an FCC rule setting franchise fees. Specifically, the plaintiff sought a declaratory judgment that an FCC regulation was invalid. *Id.* at 118–19. The defendant, apparently cooperating with the plaintiff in this respect (*id.* at 119), impleaded the FCC into the suit as a third-party defendant. *Id.* The plaintiff sought a declaration that the regulation was invalid and sought an injunction against its enforcement. *Id.* There was no question that the FCC's order setting fees was germane, or that the controlling statute answered the question without any input from the FCC.

FCC v. ITT World Comm'n, Inc., 466 U.S. 463 (1984), involved a direct injunctive challenge to an FCC procedure. The plaintiff sued the FCC to enjoin agency proceedings allegedly undertaken in violation of the Government in the Sunshine Act. Again, the controlling statute did not answer the question without any input from the FCC.

In *United States v. Any and All Radio Station Transmission Equipment*, 207 F. 3d 458 (8th Cir. 2000), and *United States v. Dunifer*, 219 F. 3d 1004 (9th Cir. 2000), the federal government brought forfeiture actions against broadcasters who failed to comply with

the FCC's licensing requirements. The Eighth and Ninth Circuits held that they could not consider Constitutional challenges to the FCC regulations. Notably, the Sixth Circuit reached the opposite conclusion in a similar case. *See United States v. Any and All Radio Station Transmission Equipment*, 204 F. 3d 658, 666-67 (6th Cir. 2000). In any event, these are cases in which the substantive rights of the parties were determined by an FCC order—and the defendants in those cases argued that the order was unconstitutional. Again, there was no controlling statute that answered the question without FCC input.

Likewise, *Cahnmann v. Sprint Corp.*, 133 F. 3d 484 (7th Cir. 1998), involved a filed rate dispute in which the FCC would need to adjudicate the validity of the tariff it set, without a controlling statute answering the question. Tellingly, this Court's discussion focused on the doctrine of primary jurisdiction and observed that "if an issue arose in the suit concerning the validity of a tariff the court would have to interrupt the litigation and, pursuant to the doctrine of primary jurisdiction, compel the parties to resort to the FCC for a determination of that validity, after which the suit could resume." *Id.* at 487. The Seventh Circuit declines to explain why this case—if the FCC interpretation of the TCPA is germane—is different such that the Court should presume validity and enter judgment on the merits.

Wilson v. A. H. Belo Corp., 87 F. 3d 393 (9th Cir. 1996), involved the specific circumstance where the FCC had issued an order claiming exclusive jurisdiction over all claims under a specific statutory provision. It did not resolve the question before this Court. To the

extent that the holding in *Wilson* was intended to extend to the circumstances at issue here, the Ninth Circuit's more recent holding in *Satterfield* reflects the current thinking of that court.

Finally, as for *Southwestern Bell Tel. Co. v. Arkansas Public Serv. Comm'n*, 738 F. 2d 901 (8th Cir. 1984), the Seventh Circuit states that it was reversed on other grounds. *See* Opinion, p. 11. It was vacated in light of this Court's holding in *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986). That opinion held that the FCC regulation considered in each of the above cases that purported to foreclose states' abilities to set intrastate telephone rates exceeded the agency's authority as delegated by Congress. *See* 476 U.S. at 359. Implicit in that holding is the Court's ability to consider whether the FCC exceeded its authority under the statute involved—and rule in favor of what Congress dictated.

In sum, these cases do not involve a situation where the claim is capable of resolution by clear, unambiguous statutory language. Plaintiff is unaware of any such case holding that a court's task in such a situation is anything other than applying the statutory language; this case is the first.

II. If the Hobbs Act's Jurisdiction-Stripping Provisions Apply, the Proper Result is a Dismissal for Want of Jurisdiction.

The principle that an Article III court's obligation to ensure its jurisdiction to resolve a controversy precedes any analysis of the merits (Opinion, pp. 7-8) does not change this analysis. Indeed,

the Seventh Circuit's holding violates that principle. The outcome in the district court and in the Seventh Circuit was a merits-based outcome. Summary judgment was granted to Prism and affirmed. If neither court had jurisdiction pursuant to the Hobbs Act, the result should have been a dismissal of the suit for lack of subject matter jurisdiction. The Seventh Circuit holds that "deeming agency action valid or ineffective is precisely the sort of review that the Hobbs Act delegates to the courts of appeals in cases challenging final FCC orders." (Opinion, p. 9). But it deemed the interpretive language in the FCC Order valid and applied it without consulting the statute.

Indeed, the Seventh Circuit's holding creates a new species of subject matter jurisdiction. Previously, "subject matter jurisdiction define[d] the court's authority to hear a given type of case," *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, -- U.S. --, 129 S. Ct. 1862, 1866 (2009), but under the Seventh Circuit's decision, subject matter jurisdiction defines the Court's authority to hear certain arguments within a case. In other words, the Court can have jurisdiction to hear a tort action involving an automobile accident but lack subject matter jurisdiction to hear whether a traffic light was red or green—or, more analogously, whether the defendant violated the motor vehicle code. Either the entire suit is one to "enjoin, set aside, suspend ... or to determine the validity of" an agency order subject to the Hobbs Act, *see* 28 U.S.C. § 2342, or it is not. If it is, the Court must dismiss the suit for lack of jurisdiction. If it is not, then there is no jurisdictional issue.

Instead, the Seventh Circuit cites subject matter jurisdiction but makes a merits determination—that

the FCC order provides Prism with a substantive defense irrespective of the TCPA—and affirms a grant of summary judgment. Thus, the Seventh Circuit's holding is that while the statute ordinarily wins a conflict between clear and unambiguous statutory language and a regulatory interpretation, but the outcome is the opposite when the regulatory interpretation in question is contained in a regulation governed by the Hobbs Act. The Hobbs Act does not support that outcome. The statute merely prescribes a means to undo administrative orders; it does not elevate such orders to a legal force greater than they would otherwise have.

CONCLUSION

This is the first case in which a court resolved a statutory liability question by consulting only a regulation and ignoring the statute. The Seventh Circuit's decision claims a jurisdictional issue compels its result, but does not discuss the incongruity of using a jurisdictional argument to support a judgment on the merits. As such, it goes against manifest precedent of both this Court and other circuit courts. For these reasons, *certiorari* is appropriate.

Respectfully submitted,

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(any footnotes trail end of each document)
No. 09-3172
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CE DESIGN, LIMITED, an Illinois corporation, individually and as the representative of a class of similarly situated persons, Plaintiff-Appellant,

v.

PRISM BUSINESS MEDIA, INCORPORATED, Defendant-Appellee.

January 20, 2010, Argued
May 27, 2010, Decided

COUNSEL: For CE DESIGN, LIMITED, an Illinois corporation, individually and as the representative of a class of similarly situated persons, Plaintiff - Appellant: Phillip A. Bock, Attorney, BOCK & HATCH, Chicago, IL; Ryan M. Kelly, Attorney, ANDERSON & WANCA, Rolling Meadows, IL; David M. Oppenheim, Attorney, WILDMAN, HARROLD, ALLEN & DIXON, Chicago, IL.

For PRISM BUSINESS MEDIA, INCORPORATED, Defendant - Appellee: David F. Cutter, Attorney, TROUTMAN SANDERS, Chicago, IL; Theresa M. Trzaskoma, Attorney, BRUNE & RICHARD LLP, New York, NY.

Before FLAUM, KANNE, and EVANS, Circuit Judges.

OPINION

EVANS, *Circuit Judge*. This is a junk fax case, and like most such cases, the facts are not especially juicy. In 2004 Prism Business Media, Inc., sent CE Design, Limited, a fax advertising a trade show.[1] That's it. But that small act sparked a lawsuit that presents some interesting jurisdictional and regulatory questions. CE Design sued Prism under the Telephone Consumer Protection Act (TCPA), which prohibits the use of fax machines to send unsolicited advertisements. *See* 47 U.S.C. § 227(b)(1)(C). Prism sought summary judgment on the ground that it shared with CE Design an "established business relationship" (EBR)--a status which, Prism argued, provided a complete defense under the Federal Communications Commission's (FCC) orders implementing the TCPA. In response, CE Design asked the district court to ignore the FCC orders because, according to it, Congress did not authorize the FCC to establish an EBR defense. Because CE Design's request sounded a lot like one "to enjoin, set aside, suspend (in whole or in part), or to determine the validity" of a final FCC order--tasks which the Administrative Orders Review Act places within the exclusive jurisdiction of the courts of appeals, *see* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a)--the district court concluded that it lacked jurisdiction to consider the validity of the EBR defense. After determining that the relationship between Prism and CE Design met the FCC's definition of an EBR, the court granted Prism's motion for summary judgment. CE Design appeals.

The few facts in this case are undisputed. Prism describes itself as a "business-to-business media

company" that publishes trade magazines and sponsors industry-specific trade shows. CE Design, a civil engineering and design firm, is among the more than five million subscribers to Prism's publications. Between 1998 and 2008 CE Design subscribed to three of Prism's publications. For each subscription, CE Design's president and sole shareholder, John Pezl, filled out Prism's subscription card. On at least two of the subscription cards, Pezl provided CE Design's fax number among the required contact information.

On August 23, 2004, Prism sent CE Design the fax that set this lawsuit in motion. Prism sent the fax to Pezl's attention at the fax number he provided in his subscription requests. The fax advertised an upcoming trade show. It included a notice inviting Pezl to write "remove" on the face of the advertisement and fax it back to a toll-free number if he believed he received the fax in error or if he wished to unsubscribe. Instead of accepting that invitation, CE Design this putative class-action lawsuit.[2]

In its complaint, CE Design alleged that Prism violated the TCPA provision prohibiting the use of "any telephone facsimile machine . . . to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). In 2005--after Prism sent the fax but before CE Design filed this suit--Congress passed the Junk Fax Protection Act (JFPA), which amended the TCPA to exempt from the ban on unsolicited fax advertisements any faxes sent "from a sender with an established business relationship with the recipient." 47 U.S.C. § 227(b)(1)(C)(i). But the pre-JFPA version of the TCPA applies in this case, and the EBR exemption does not appear in that version of the statute. Instead,

before 2005 the EBR exemption appeared only in FCC reports and orders implementing the TCPA. *See, e.g., In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* (1992 Report and Order), 7 F.C.C.R. 8752, 8779 n.87 (Oct. 16, 1992). Specifically, the FCC's 1992 Report and Order states that "facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient." *Id.*

In its summary judgment motion, Prism argued that the FCC's 1992 Report and Order provides a complete defense to CE Design's TCPA claim. Prism argued that CE Design's status as a subscriber to Prism's publications meant that they had an EBR at the time Prism faxed the advertisement, and accordingly, the fax it sent CE Design should be deemed invited. In response, CE Design argued that the district court should ignore the 1992 Report and Order, as well as subsequent FCC orders demonstrating that before Congress passed the JFPA, the FCC considered the EBR exemption to apply to faxed advertisements. *See, e.g., In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 F.C.C.R. 12391, 12408 (Aug. 7, 1995); *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* (2003 Report & Order), 18 F.C.C.R. 14014, 14127 (July 3, 2003). CE Design argued that the FCC was not authorized to interpret the TCPA to include an EBR exemption, and that even if it were, the FCC's interpretation is unreasonable.

In its thorough and thoughtful opinion granting Prism summary judgment, the district court concluded that it

lacked jurisdiction to consider CE Design's argument that the FCC was not authorized to establish an EBR defense. Specifically, it noted that the Administrative Orders Review Act, better known as the Hobbs Act, reserves to the courts of appeals the power "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" all final FCC orders, *see* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a), and that before seeking relief from an appellate court, a party aggrieved by the FCC's final order must petition the FCC for reconsideration, *see* 47 U.S.C. § 405(a). The district court observed that CE Design's characterization of the EBR exemption as "unauthorized" amounted to an indirect challenge to the FCC's rule, and accordingly, it concluded that it lacked jurisdiction to consider the validity of the EBR exemption. Instead, the district court considered only whether the EBR exemption applies to the facts of this case.[3] After carefully considering the FCC's EBR definition, the district court determined that at the time Prism faxed CE Design its advertisement, the parties had an EBR. Accordingly, the fax was deemed to have been invited, and Prism was entitled to summary judgment on CE Design's TCPA claim.

We review the district court's grant of summary judgment de novo. *See Covell v. Menkis*, 595 F.3d 673, 675 (7th Cir. 2010). CE Design presses two main arguments on appeal: first, that the district court's jurisdictional analysis is erroneous because, according to CE Design, the court had no need to consider the EBR exemption at all; and second, that even if the EBR exemption applies, an EBR exists only where the recipient is a residential subscriber. Because CE Design characterizes itself as a business subscriber, it

argues that its relationship with Prism does not qualify as an EBR.

In challenging the district court's jurisdictional analysis, CE Design argues that under the familiar analytical framework established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 69 (1984), there was no need for the court to consider the FCC's rules or the Hobbs Act's jurisdictional bar in evaluating its TCPA claim. The familiar *Chevron* framework is a tool for judicial review of "an agency's construction of the statute which it administers." *Chevron*, 467 U.S. at 842; *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000). In applying the *Chevron* framework, the court first asks whether the statute is silent or ambiguous on the question at issue, and if it is, the court will look to the agency regulations to determine whether they are based on a reasonable construction of the statute. *Chevron*, 467 U.S. at 842-43; *Castro v. Chi. Hous. Auth.*, 360 F.3d 721, 727 (7th Cir. 2004). According to CE Design, the district court needed to consider its jurisdiction to review the EBR defense only if it found the TCPA ambiguous and moved past step one of the *Chevron* analysis. Specifically, CE Design argues that the FCC-created EBR defense conflicts with the TCPA's plain language, which prohibits businesses from faxing unsolicited advertisements and defines "unsolicited advertisement" as one "which is transmitted to any person without that person's prior express invitation or permission." *See* 47 U.S.C. § 227(a)(5). CE Design asserts that the phrase "prior express invitation or permission" is unambiguous, and accordingly, it argues that under the *Chevron*

framework, there was no need for the district court to even consider the agency-created EBR defense. CE Design therefore concludes that the Hobbs Act's proscription of district court review of final FCC orders should never have come into play in this case.

CE Design's argument presents something of a chicken-and-an egg question: What comes first, the Hobbs Act's jurisdictional restrictions or step one of *Chevron*? But while one can go around and around on the chicken-and-the-egg dilemma, an Article III court's obligation to ensure its jurisdiction to resolve a controversy precedes any analysis of the merits. *See Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2768, 171 L. Ed. 2d 737 (2008); *Morales-Morales v. Ashcroft*, 384 F.3d 418, 421 (7th Cir. 2004). In arguing that the district court can put off considering its jurisdiction until after step one of *Chevron*, CE Design turns that traditional approach on its head. What's more, CE Design's suggestion that the district court can embark on step one of the *Chevron* analysis without reviewing the FCC's EBR defense ignores both the purpose and the effect of the *Chevron* framework. *Chevron* is designed to help courts determine the validity of a challenged agency regulation by determining two things: First, whether Congress expressly or implicitly delegated authority to the agency to fill in any gaps in the statute that the agency administers; and second, whether the agency's rule is based on a reasonable construction of that statute. *Chevron*, 467 U.S. at 842-44; *see also Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 738-39 (5th Cir. 2005) (noting that *Chevron* guides a court's determination of a regulation's validity); *Castro*, 360 F.3d at 727 (same). The purpose of even just the first step of the *Chevron* analysis is to

determine the validity of the agency's interpretation. *See Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 983 (7th Cir. 1998); *Square D. Co. & Subsidiaries v. C.I.R.*, 438 F.3d 739, 745 (7th Cir. 2006). If at step one the court determines that the statutory language is clear, it then decides whether the plain meaning of the text supports or opposes the challenged regulation. *Khan v. United States*, 548 F.3d 549, 554 (7th Cir. 2008). The effect of that decision is to " 'either strike or validate' " the regulation interpreting the statute. *Id.* (quoting *Bankers Life*, 142 F.3d at 983). But deeming agency action valid or ineffective is precisely the sort of review that the Hobbs Act delegates to the courts of appeals in cases challenging final FCC orders.[4] 28 U.S.C. § 2342(1); *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468, 104 S. Ct. 1936, 80 L. Ed. 2d 480 (1984); *see also Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 399-400 (9th Cir. 1996) (noting that asking a district court to agree or disagree with an FCC ruling invokes the Hobbs Act's jurisdictional bar).

CE Design argues that asking a district court to "ignore" the EBR defense at step one of its *Chevron* analysis is not the same as asking the court to invalidate the rule. We just don't see the difference in this fine distinction. When Prism raised the EBR exemption as a defense to CE Design's TCPA claim, it inherently called upon the district court to enforce the FCC's rule. CE Design's request that the court "ignore" the rule is just another way of asking it *not* to enforce the rule. That CE Design's challenge to the FCC's EBR defense arises in a dispute between private parties makes no difference--the Hobbs Act's jurisdictional limitations are "equally applicable whether [a party] wants to challenge the rule directly . . . or indirectly, by

suing someone who can be expected to set up the rule as a defense in the suit." *City of Peoria v. Gen. Elec. Cablevision Corp. (GECCO)*, 690 F.2d 116, 120 (7th Cir. 1982); *see also United States v. Dunifer*, 219 F.3d 1004, 1006-07 (9th Cir. 2000) (noting that the Hobbs Act's jurisdictional bar applies to affirmative defenses); *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000) (holding that Hobbs Act barred district court review of challenge to validity of FCC regulations raised as defense in forfeiture action); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487-88 (7th Cir. 1998) (noting that where issue arises in federal suit regarding validity of FCC order court "would have to interrupt the litigation and . . . compel the parties to resort to the FCC for a determination of that validity"). That is exactly the case here, where Prism pointed to the FCC's EBR exemption as a defense to CE Design's statutory claim. Because CE Design argued that the district court should ignore--or in other words, invalidate--the FCC's EBR exemption for purposes of this suit, the Hobbs Act's jurisdictional bar came into play. *See Any & All Radio Station Transmission Equip.*, 207 F.3d at 463 ("Whichever way it is done, to ask the district court to decide whether the regulations are valid violates" the Hobbs Act.); *see also Biggerstaff v. FCC*, 511 F.3d 178, 184-85, 379 U.S. App. D.C. 149 (D.C. Cir. 2007) (noting that Hobbs Act precludes challenge to EBR defense).

CE Design's attempt to show that there is a difference between asking the court to ignore a regulation at *Chevron's* step one and asking it to set aside or invalidate a regulation cannot be squared with its repeated characterization of the FCC's decision to establish the EBR defense as being unauthorized or

"ultra vires." CE Design describes the legislative history of the EBR defense and argues that Congress rejected it intentionally and never gave the FCC the authority to resurrect it. But as the Supreme Court has made clear, a litigant can't avoid the Hobbs Act's jurisdictional bar simply by accusing an agency of acting outside its authority. *See ITT World Commc'ns, Inc.*, 466 U.S. at 468-69; *see also Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43-44, 112 S. Ct. 459, 116 L. Ed. 2d 358 (1991) (same with respect to exclusive jurisdiction provision set forth in 12 U.S.C. § 1818(i)(1)). And as we have explained, *Chevron* is designed to resolve whether Congress expressly or implicitly delegated authority to an agency to interpret a statute. *See Joseph v. Holder*, 579 F.3d 827, 831 (7th Cir. 2009). If it did not, the agency action is invalid. *See Ceta v. Mukasey*, 535 F.3d 639, 642 & 643 n.7 (7th Cir. 2008) (noting that finding statute clear at *Chevron's* step one invalidates challenged regulation). CE Design's insistence that the FCC's EBR defense is "unauthorized" merely illustrates Prism's point that their dispute turns on the validity of an FCC order. *See ITT World Commc'ns, Inc.*, 466 U.S. at 468-69; *Sw. Bell Tel. Co. v. Ark. Pub. Serv. Comm'n*, 738 F.2d 901, 906-07 (8th Cir. 1984) (vacated on other grounds) (noting that a party "cannot bypass" the Hobbs Act by characterizing agency action as "ultra vires"). But the Hobbs Act prevents the district court from reviewing the validity of FCC regulations, and we, in turn, presume them valid for purposes of this appeal. *See Jennings*, 304 F.3d at 958 n.2.[5]

None of the cases on which CE Design relies in challenging the district court's jurisdictional analysis demonstrate that a district court may proceed through

step one of the *Chevron* analysis without rubbing up against the Hobbs Act's jurisdictional bar. Some of the cases to which CE Design points involve state-agency decisions or rules that are not even subject to the Hobbs Act's jurisdictional bar and therefore have nothing to say about the Hobbs Act's interplay with *Chevron*. *See, e.g., Cler v. Ill. Educ. Ass'n*, 423 F.3d 726 (7th Cir. 2005); *Ind. Bell Tel. Co. v. McCarty*, 362 F.3d 378 (7th Cir. 2004); *United States v. Dierckman*, 201 F.3d 915 (7th Cir. 2000); *Sprint Spectrum L.P. v. State Corp. Comm'n of the State of Kan.*, 149 F.3d 1058 (10th Cir. 1998). Others involve disputes over the application--rather than the validity--of FCC rules. *See, e.g., In re Airadigm Commc'ns, Inc.*, 519 F.3d 640 (7th Cir. 2008); *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004). Still others clearly state that no FCC decision governed the matter. *See, e.g.,Verizon New Eng., Inc. v. Me. Pub. Util. Comm'n*, 509 F.3d 1, 11 (1st Cir. 2007); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002).

The few remaining cases to which CE Design points do not even mention the Hobbs Act's jurisdictional bar, let alone describe its interplay with *Chevron*. CE Design points with particular urgency to *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications*, 550 U.S. 45, 127 S. Ct. 1513, 167 L. Ed. 2d 422 (2007), and *Core Communications, Inc. v. Verizon Pennsylvania, Inc.*, 493 F.3d 333 (3d Cir. 2007), describing them as cases applying the *Chevron* analysis to determine the legality of FCC rules without proceeding through the Hobbs Act's jurisdictional channels. But those cases involved situations where the FCC attempted to expand, *see Global Crossing*, 550 U.S. at 47-48, or limit, *see Core Commc'ns*, 493 F.3d at

337, the jurisdiction of the district courts. The respective courts looked to *Chevron* only to answer threshold questions of whether the FCC could create a cause of action, *Global Crossing*, 550 U.S. at 53-55, or limit otherwise available routes to federal court, *Core Commc'ns*, 493 F.3d at 339. A closer case is *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009), which CE Design cited in its reply brief. In *Satterfield*, the Ninth Circuit applied *Chevron* deference to an FCC order determining that the TCPA's ban on using automatic telephone dialing systems to call cell phone numbers applied to text messages. *Id.* at 952-53. There, the Ninth Circuit embarked on a *Chevron* analysis of the FCC's order without considering the implications of the Hobbs Act. But the Ninth Circuit's silence on the issue does not lend persuasive support to CE Design's theory that a district court can engage in the *Chevron* analysis without questioning its jurisdiction to determine the validity of the regulation in question. CE Design simply has not cited any cases that directly support its central thesis.

In a final effort to discredit the district court's jurisdictional analysis, CE Design warns us that the consequences of adhering to the Hobbs Act here would be "an affront to the Constitution" and would allow agency interpretation to trump congressional intent in a way that violates separation-of-powers principles. Specifically, it argues that the district court's jurisdictional analysis renders the Hobbs Act unconstitutional by preventing "the court from reading and applying the plain language" of the TCPA. But that is pure bluster (dressed up in CE Design's rather hyperbolic analogies to nuclear missiles and the Cold War). In passing the Hobbs Act, Congress vested the

power of agency review of final FCC orders exclusively in the courts of appeals. 28 U.S.C. § 2342(1). The Hobbs Act's jurisdictional bar thus does not leave private parties without a mechanism for judicial review of agency action; it merely requires litigants to seek review through its specific procedural path. *See GECCO*, 690 F.2d at 120-21; *see also ITT World Commc'ns*, 466 U.S. at 468 & n.5. To allow parties to bypass that procedure would ignore Congress's "specific grant of exclusive jurisdiction in the courts of appeals for review of FCC orders." *Sw. Bell*, 738 F.2d at 906; *see also Am. Bird Conservancy v. FCC*, 545 F.3d 1190, 1194 (9th Cir. 2008) (noting that "a plaintiff may not escape an exclusive avenue of judicial review through artful pleading"). And the procedural path designed by Congress serves a number of valid goals: It promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows "uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress" to enforce the TCPA. *Dunifer*, 219 F.3d at 1008 (quoting *N.Y. Co. v. N.Y Dep't of Labor*, 440 U.S. 519, 528, 99 S. Ct. 1328, 59 L. Ed. 2d 553 (1979)); *see also Sw. Bell*, 738 F.2d at 906-07.

Having concluded that the district court correctly determined that it lacked jurisdiction to consider whether to enforce the EBR defense in the present case, we turn to CE Design's argument that its subscriber relationship with Prism does not fall within the FCC's definition of an EBR. Specifically, it points to a subpart of the FCC's 1992 Report and Order stating that "as used in this section . . . [t]he term 'established business relationship' means a prior or existing

relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber." *See* 7 F.C.C.R. at 8792-93. Based on that definition's inclusion of the term "residential subscriber," CE Design argues that an EBR exists only where the fax recipient is a private individual or a business run from a residence. Because CE Design describes itself as a business subscriber, it concludes that "it did not have an EBR with Prism or any other broadcaster."

We agree with the district court's conclusion that CE Design's reading of the FCC's pre-JFPA definition of EBR is far too narrow. The definition on which CE Design bets its hand is located in the implementing regulations appended to the 1992 Report and Order--specifically, under the heading "Subpart L--Restrictions on Telephone Solicitation." 7 F.C.C.R. at 8790. Subpart L addresses the TCPA's limitations on automated calls to residences and makes no mention of unsolicited faxes. In that limited context, it makes sense that the FCC restricted the EBR definition to residential subscribers--Subpart L is geared toward preventing people from being bombarded at home with annoying automated phone calls. In the section specific to faxed advertisements, the FCC states that unsolicited faxed ads "can be deemed to be invited or permitted by the recipient," but does not in any way limit the term "recipient," or otherwise indicate that the EBR defense is limited to residential subscribers. 7 F.C.C.R. at 8779 n.87. More importantly, the whole of the 1992 Report and Order demonstrates that the FCC did not intend the limited reading of the EBR defense that CE Design ascribes to it here. For example, elsewhere in the 1992 Report and Order the FCC explains that the term

"business relationship" should be construed broadly and that an EBR is "a prior or existing relationship formed by a voluntary two-way communication between the caller and the called party, which relationship has not been previously terminated by either party." Id. at 8771. In describing the types of relationships that are encompassed by an EBR, the FCC specifically cited "publishers with subscribers" as an example. *Id.* Accordingly, it would be hard not to conclude that the FCC intended for relationships like that between Prism and CE Design--a publisher and its subscriber--to fall within the scope of the EBR exception.

In various orders issued following the promulgation of the 1992 rules, the FCC continued to emphasize a broad reading of the relationships covered by the EBR defense. In 2001 the FCC issued a public notice reminding consumers about the TCPA's junk fax prohibition. In that notice, the FCC explained that the prohibition on unsolicited faxes "applies to unsolicited advertisements transmitted to both businesses and residences . . . . An established business relationship, however, demonstrates consent to receive fax advertisement transmissions." 16 F.C.C.R. 4524 (Feb. 20, 2001). In the 2003 Report and Order, the FCC explained that the EBR exemption was "sufficient to show that an individual or business has given their express permission to receive unsolicited facsimile advertisements."[6] 18 F.C.C.R. at 14127. Given the FCC's broad reading of the EBR definition, we agree with the district court that the FCC did not intend to limit the EBR exemption to only residential subscribers who receive unsolicited faxes. And because Prism and CE Design's publisher-subscriber relationship falls within the scope of business

relationships the FCC intended the EBR defense to cover, we also agree that the EBR exemption applies in this case.

The judgment of the district court is AFFIRMED.

Footnotes

1Before this suit was filed, Prism Business Media, Inc., changed its name to Penton Business Media, Inc., but the parties and the district court have referred to the defendant as Prism throughout this litigation. For consistency's sake, we will do the same

2We think it's worth noting that CE Design is no stranger to junk fax litigation; it has filed more than 100 similar suits under the TCPA.

3Although the Hobbs Act prevents the district court from considering the validity of final FCC orders, the court retains jurisdiction to determine whether the parties' actions violate FCC rules. *See, e.g., U.S. West Commcn's, Inc. v. Jennings*, 304 F.3d 950, 958 & n.2 (9th Cir. 2002); *GTE S., Inc. v. Morrison*, 199 F.3d 733, 742-43, 746-47 (4th Cir. 1999).

4On appeal CE Design has not argued that the 1992 Report and Order setting forth the EBR defense is anything other than a final FCC order.

5CE Design suggests in a footnote in its opening brief that we have jurisdiction under the Hobbs Act to invalidate the FCC's EBR exemption. But of course, CE Design "cannot use an appeal from a district court to circumvent the Hobbs Act's requirement that a

challenge to an FCC order is subject only to *direct* review in a court of appeals." *See GTE S., Inc.*, 199 F.3d at 743.

6n the 2003 Report and Order, the FCC reversed its stance and said that as of the effective date of the new rules it was implementing, an EBR would no longer provide a defense. But those rules never took effect before Congress passed the JFPA, and in the interim the FCC continued to recognize the EBR exemption.

No. 07 C 5838

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

CE DESIGN LTD., Plaintiff,

v.

PRISM BUSINESS MEDIA, INC., Defendant.

August 12, 2009, Decided
August 12, 2009, Filed

REBECCA R. PALLMEYER, United States District Judge.

MEMORANDUM OPINION AND ORDER

Plaintiff CE Design Ltd. ("CE Design") brings this action against Defendant Prism Business Media, Inc. ("Prism")[1] alleging violations of the Telephone Consumer Protection Act ("TCPA"), which prohibits, among other things, the sending of unsolicited fax advertisements without the recipient's "prior express invitation or permission." 47 U.S.C. § 227. Plaintiff filed suit as a putative class action on August 16, 2007 in the Circuit Court of Cook County, Illinois, and Defendant timely removed the case to this court on the basis of federal question jurisdiction, 28 U.S.C. § 1331, and, alternatively, on the basis of diversity jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). ("Notice of Removal" [1] ¶¶ 1, 4.)

The facts are largely undisputed. On August 23, 2004, Defendant faxed an advertisement to Plaintiff at its place of business in Rolling Meadows, Illinois. At the time, Plaintiff subscribed to several trade magazines published by Defendant, and Defendant used a fax number Plaintiff had voluntarily supplied in conjunction with these subscriptions. Plaintiff alleges that the fax advertisement was sent without its express permission in violation of the TCPA and pursuant to Defendant's "policy and practice of faxing unsolicited advertisements to persons in Illinois and other states." (Compl. ¶¶ 1, 2.) In response, Defendant asserts that its conduct falls within an exception to the TCPA's prohibition on unsolicited fax advertisements where the sender and recipient have an "established business relationship" ("EBR"), and that such a relationship constitutes a complete defense to liability. Defendant has moved for summary judgment, and for the reasons discussed below, its motion is granted.

FACTUAL BACKGROUND[2]

The Parties

Prism is a "business-to-business media company," incorporated in Delaware and with its principal place of business in New York City. (Def. 56.1 ¶ 1.) As a business-to-business (as opposed to direct-to-consumer) media publisher and supplier, Prism publishes more than 100 trade magazines and electronic newsletters, and sponsors national industry-specific trade shows both in the United States and abroad. (Def. 56.1 ¶ 5.) Prism's publications have a current circulation of more than five million readers, which include both business and individual subscribers. (Def. 56.1 ¶ 6.) Prism solicits

new subscribers by placing subscription cards in publications, contacting potential subscribers through telemarketing campaigns, promoting its publications at trade shows, and making offers through direct mail, by phone, and over the internet. (Def. 56.1 ¶ 7.) A new subscription record is created when a potential subscriber accepts Prism's solicitation and is "qualified," that is, the subscriber meets a specific demographic profile for a free subscription. (Def. 56.1 ¶ 9.) Prism maintains demographic information on its subscribers, including the nature of the individual subscriber's business, its title, company size, and purchasing authority. (Def. 56.1 ¶ 8.) Since 2003, Prism has used Hallmark Data Systems, Inc. ("Hallmark") as its "circulation fulfillment vendor," a role which entails maintaining and updating Prism's subscription lists by storing subscription source documents in accordance with BPA's audit requirements, managing subscriber accounts, and updating subscriber databases with information obtained from Prism's telemarketing, direct mail, and e-mail vendors. (Def. 56.1 ¶¶ 13-14.)

Each year, Prism "requalifies" subscribers to confirm that their subscription data is accurate and that they wish to continue receiving the publication or publications to which they subscribe. (Def. 56.1 ¶ 15.) The process of requalification entails contacting the subscriber using various methods, including telemarketing campaigns, subscription renewal cards, and solicitations through e-mail or over the internet. (Def. 56.1 ¶ 16.) If a subscriber fails to requalify for two consecutive years, the subscription is canceled, and the subscriber is removed from the publication's subscription list. (Def. 56.1 ¶ 54.)

CE Design is an Illinois corporation with its principal place of business in Rolling Meadows, Illinois. (Def. 56.1 ¶ 2.) Although CE Design does not specify its business in the pleadings, the court has located a website in the company's name, describing it as a professional civil engineering and design firm that offers its services "throughout the Midwest including Illinois, Indiana, Kentucky, Michigan, Minnesota, Ohio, Pennsylvania, and Wisconsin." *See* http://www.cedesignltd.com (last visited Aug. 6, 2009). John Pezl is CE Design's president and sole shareholder. (Def. 56.1 ¶ 33.)

The Parties' Business Relationship

CE Design admits that it subscribed to no fewer than three of Defendant's publications between 1999 and 2008. (PI. 56.1 Resp. ¶¶ 37-40, 42-43, 45-46, 48, 53-54, 56-58, 61, 64.) According to Prism's records, in December 1999, Pezl filled out a subscription card for "American City & Country" ("AC&C"), a publication "serving the field of municipal and county government including mayors, city and county managers, city and county engineers, and related companies such as consulting engineering firms and other independent contractors." (Def. 56.1 ¶¶ 36, 38.) On the subscription card, Pezl provided CE Design's address, phone number, and fax number, and affirmed that the subscription was in his name as the president of CE Design. (Def. 56.1 ¶ 38.) Thereafter, Pezl renewed CE Design's subscription by submitting a subscription renewal card each year from 2000 through 2006 and again in 2008. In 2007, CE Design renewed its subscription via the internet. (Def. 56.1 ¶ 39.)

According to Prism's records, from 2002 through 2005,

CE Design subscribed to "Electrical Construction & Maintenance" ("EC&M"), a publication that provides technical information to electrical professionals, such as electrical contractors, industrial plants, and consulting electrical engineers. (Def. 56.1 ¶ 44, 45-54.) Again, the subscription was in Pezl's name as president of CE Design, and Prism's records show that Pezl provided CE Design's address, phone, number, and fax number. (Def. 56.1 ¶ 45.) In 2003 and 2004, an independent telemarketing firm employed by Prism confirmed CE Design's subscription information. (Def. 56.1 ¶ 48.) In 2005 and 2006, CE Design failed to requalify for a subscription to EC&M, and Prism removed CE Design from its EC&M subscription list in 2006 pursuant to its standard practice. (Def. 56.1 ¶¶ 53-54)

Finally, Prism's records indicate that from 2003 through 2007, CE Design subscribed to "Retail Traffic," a publication with a focus on real estate and whose subscribers include developers, owners, retailers, brokers, architects and lenders. (Def. 56.1 ¶ 55, 57.) As with its subscriptions to AC&C and EC&M, the subscription was in Pezl's name as president of CE Design, and Prism's subscriber record included CE Design's address and telephone number, but not its fax number. (Def. 56.1 ¶¶ 58-59.) CE Design renewed its subscription by phone in 2004, by mailing in two subscription cards signed by Pezl in 2005, and via the internet in 2006 and 2007. (Def. 56.1 ¶¶ 61, 64.)

The Electrical West Fax

On August 23, 2004, Prism sent a fax to CE Design and other subscribers, advertising an upcoming trade show called "Electrical West." (Def. 56.1 ¶ 67.) Prism sent the

fax to "J Pezl" at "CE Design Ltd," using the fax number provided in connection with the AC&C and EC&M subscriptions. (Def. 56.1 ¶ 68.) The fax included a notice inviting the recipient to write "remove" on the face of the advertisement and fax it back toll-free at the number provided if the recipient believed it had received the fax "in error" and wished to unsubscribe. (Pl. 56.1 Resp. ¶ 69.) CE Design never sought to unsubscribe before or after Defendant sent the August 23, 2004 fax. (Def. 56.1 ¶ 70.) CE Design has not alleged that Prism sent any other unsolicited fax advertisements to its fax machine before or since the August 23, 2004 fax.

DISCUSSION

In its single claim in this case, Plaintiff alleges that Defendant violated a provision of the TCPA that prohibits the "use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine." [3] 47 U.S.C. 227(b)(1). The statute provides a private right of action for injunctive relief and/or damages for a violation of 47 U.S.C. 227(b). The TCPA is a strict liability statute, but the court has discretion to award treble damages for a willful or knowing violation of 47 U.S.C. 227(b).

Plaintiff alleges that "[o]n or about August 23, 2004, Defendant transmitted by telephone facsimile machine an unsolicited advertisement to Plaintiff's facsimile machine," and that "Defendant knew or should have known (i) Exhibit A [the August 23, 2004 fax advertisement] was an advertisement and (ii) Defendant did not have permission or invitation to send

Exhibit A to Plaintiff and the other members of the class." (Compl. ¶¶ 11, 12.) Plaintiff claims it suffered damages in the form of the cost of the paper and toner consumed when Defendant transmitted the fax advertisement and in employee time lost in the receipt, routing, and review of Defendant's faxes. (Compl. ¶ 26.) Plaintiff alleges that it is a member of a larger class that has suffered similar harm as a result of Defendant's actions. (Compl. ¶ 16.)

Defendant admits that it faxed an advertisement to Plaintiff on August 23, 2004 and that it did so without Plaintiff's express permission. Defendant contends that it is nonetheless not liable under the TCPA because an "established business relationship" ("EBR") existed between Prism and CE Design by virtue of CE Design's voluntary subscriptions to Prism publications. This so-called "EBR exemption" to the TCPA's general prohibition of unsolicited fax advertisements does not appear in the TCPA itself. Rather, it is a creature of the FCC's rulemaking powers, and its validity and application was the subject of some contention prior to 2005, when Congress passed the Junk Fax Protection Act ("JFPA"), amending the TCPA to codify the EBR exemption. *See* Junk Fax Prevention Act of 2005 § 2(a), Pub. L. No. 109-21, 119 Stat. 359. As it is currently drafted, the JFPA exempts from the statute's prohibition on unsolicited fax advertisements any advertisements "from a sender with an established business relationship with the recipient." 47 U.S.C. § 227(b)(1)(C)(i)). Because the alleged violation occurred before the adoption of the JFPA, in this case the court must apply the law as it existed before the passage of that Act.

Plaintiff does not dispute that it has a an "established business relationship" with Defendant under the TCPA. Instead, Plaintiff presents two arguments in opposition to summary judgment, both of which challenge the application of the EBR exemption for fax advertisements. First, Plaintiff contends that the FCC exceeded its rule-making authority and contradicted the plain language of the TCPA in promulgating the EBR exception. Plaintiff suggests that the court has authority under *Chevron* to ignore, without invalidating, the FCC's erroneous interpretation of the clear and unambiguous language of the TCPA. Second, Plaintiff argues that even if the EBR exemption is a valid exercise of the FCC's rulemaking authority, Defendant is nonetheless subject to liability because the defense apples only to residential subscribers, not business subscribers, and CE Design is a business.

The FCC's Recognition of an EBR Exemption

The genesis of the EBR exemption is somewhat uncertain, and its recognition and application by courts has been far from consistent. By way of background, the court begins with the exemption's legislative origins before proceeding to address its application in this case. On December 20, 1991, Congress enacted the TCPA, to prohibit, among other things, the use of telephone facsimile machines, computers, and other similar devices to send unsolicited advertisements to consumers. *See* TCPA, Pub L. No. 102-243 § 3(a), 105 Stat. 2394, 2396 (1991) (current version at 47 U.S.C. § 227(b)(1)(C)). The statute defined "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person

without that person's prior express invitation or permission." *Id.* § 3(a), 105 Stat. at 2395. Included in the original Act was a provision empowering the FCC to promulgate rules and regulations to implement the TCPA. *Id.* § 3(c), 105 Stat. at 2397 ("Within 120 days after the date of enactment of this section, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object.")

Following the TCPA's enactment, the FCC began promulgating rules and regulations, including language that contemplated limitations on liability for faxes sent pursuant to a preexisting business relationship. In a 1992 Report and Order, the FCC acknowledged the TCPA's explicit ban on unsolicited fax advertisements, but noted that "facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient." *In Re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* [hereinafter "1992 Report and Order"], 7 F.C.C.R. 8752, 8779 n.87 (Oct. 16, 1992). In recognizing this exception for existing business relationships, the FCC explained that the statute's legislative history supported the conclusion that "a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests" and, further, that "the TCPA does not intend to unduly interfere with ongoing business relationships." *Id.* at 8770. The FCC observed, however, that an EBR may be terminated by the recipient's request to terminate future communications. *Id.* at 8784 n.47.

Despite this apparent acknowledgment of an EBR exemption for fax advertisements, the FCC did not explicitly incorporate such an exemption into its final rules issued on October 23, 1992. Rules and Regulations, 57 Fed. Reg. 48,333, 48,335 (Oct. 23, 1992). In those rules, the FCC merely recognized an EBR exemption for automated or prerecorded telephone calls to residences, and defined an EBR as follows:

> The term "established business relationship" means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

Id. The Rules' language regarding fax machines simply reads, "No person may . . . use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." *Id.* There is no explicit mention of an EBR exemption for fax advertisements.

In the FCC's view, however, the matter was settled with respect to faxes as well. In 1995, in response to challenges of vagueness from petitioners seeking reconsideration of the 1992 Report and order, the FCC stated that "[The 1992 Report and Order] makes clear that the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions." *In Re Rules*

and Regulations Implementing the Telephone Consumer Protection Act of 1991 [hereinafter "1995 Report and Order"], 10 F.C.C.R. 12391, 12408 (Aug. 7, 1995).

So matters stood until 2003, when the FCC revisited the EBR exemption once again, this time to propose eliminating its application to fax advertisements. In a 2003 Report and Order, the FCC stated,

> We now reverse our prior conclusion that an established business relationship provides companies with the necessary express permission to send faxes to their customers. As of the effective date of these rules, the EBR will no longer be sufficient to show that an individual or business has given their express permission to receive unsolicited facsimile advertisements.

In Re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 [hereinafter "2003 Report and Order"], 18 F.C.C.R. 14014, 14127 (June 26, 2003). The new rule was never implemented, however, because the FCC delayed its effective date after learning that Congress intended to act on the issue. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 16972 (Aug. 18, 2003); *see Biggerstaff v. FCC*, 511 F.3d 178, 182, 379 U.S. App. D.C. 149 (D.C. Cir. 2007) (describing the history of the TCPA's EBR exemption).

When Congress did act, in 2005, it chose to codify the EBR exemption for faxed advertisements in the JFPA. *See* JFPA, 47 U.S.C. § 227(b)(1)(C)(i)) (recognizing an

exemption from liability under the TCPA for unsolicited fax advertisements "if the unsolicited advertisement is from a sender with an established business relationship with recipient"). The JFPA thus explicitly adopted the defense for fax advertisements sent to business subscribers, with whom the sender has an established business relationship, and, consequently, the FCC's proposed 2003 rule eliminating the EBR exemption was never implemented. *See id.* at § 227(a)(2)(A); Statement of Sen. Gordon Smith, Testimony Before Senate Committee on Commerce, Science, and Transportation, Subcommittee on Consumer Affairs, Foreign Commerce and Tourism (Apr. 13, 2005), *available at* 2005 WL 853590 ("The purpose of this legislation is to preserve the established business relationship exception currently recognized under the TCPA.") The JFPA came into effect after the alleged violation in this case, however, and the court must look at the law as it existed when Defendant sent Plaintiff the fax advertisement on August 23, 2004.

Statutory Bar to District Court Review of the EBR Exemption

Plaintiff contends that the FCC's EBR exemption for fax advertisements is an arbitrary and unreasonable interpretation of the TCPA that should not be available as a defense in this case. Before reaching the merits of this argument, the court must first address whether it may consider the validity of the FCC's 1992 interpretation of the TCPA or whether the Hobbs Act prevents it from second-guessing the Commission's recognition of an EBR exception for fax advertisements.

Ordinarily, courts reviewing agency action must apply the principles of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under *Chevron*, the court asks first whether a statute is silent or ambiguous with respect to the agency decision at issue. *See City of Chicago v. F.C.C.*, 199 F.3d 424, 427 (7th Cir. 1999). If Congress has spoken directly to the issue, then "that is the end of the matter," and the language of the statute is the law. *Chevron*, 467 U.S. at 842. If, however, congressional intent is unclear or the statute is silent, the court decides "whether the agency's determination is based on a permissible construction of the statute." *City of Chicago*, 199 F.3d at 428. Under the Administrative Procedure Act ("APA"), the court will defer to the agency's interpretation of an ambiguous statute unless it is "arbitrary [or] capricious." *See* 5 U.S.C. § 706.

This general power to review administrative action may, however, be circumscribed or even foreclosed by statute. When the FCC rules on telephone and telegraph matters, Congress has limited the availability of judicial review to the federal courts of appeals. Chapter 158 of title 28, called the Administrative Orders Review Act, reserves to the courts of appeals (other than the Court of Appeals for the Federal Circuit) the power "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342 and § 2342(1); *see Biggerstaff*, 511 F.3d at 184-85 (applying § 402(a) and § 2342 in action challenging the validity of the 1992 EBR exemption). Section 402(a) in turn provides that in "any action to enjoin, set aside, annul, or suspend any order of the [FCC]," judicial review "shall be provided by and

in the manner prescribed in chapter 158 of title 28." 47 U.S.C. § 402(a). Together, the Administrative Orders Review Act and § 402(a) "vest the courts of appeals with exclusive jurisdiction to review the validity of FCC rulings." *US West Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1054 (9th Cir. 2000); *see City of Peoria v. Gen. Elec. Cablevision Corp. (GECCO)*, 690 F.2d 116 (7th Cir. 1982) ("Proceedings for judicial review of final orders of the FCC . . . may be brought only in a federal court of appeals." (citations omitted)). In short, a petitioner challenging the validity of an FCC order may seek review of that order only in a federal court of appeal. *See Fed. Commnc'ns Comm'n. v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468, 104 S. Ct. 1936, 80 L. Ed. 2d 480 (1984) ("Litigants may not evade these provisions by requesting the District Court to enjoin action that is the outcome of the agency's order." (citing 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a)); *Columbia Broadcasting Sys. v. United States*, 316 U.S. 407, 425, 62 S. Ct. 1194, 86 L. Ed. 1563 (1942) (discussing application of the Administrative Orders Review Act and § 402(a) to final orders of the FCC). Further, if the petitioner "was not a party to the proceedings resulting in such order, decision, report, or action" and therefore was not entitled to direct appeal, it must first petition the FCC for reconsideration before seeking judicial review. 47 U.S.C. § 405(a); *see WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1273 (10th Cir. 2007) (recognizing the Act's prescribed procedure for challenging FCC rulings and noting that "we must assume the FCC's order . .. is valid under the Telecommunications Act" unless that procedure has been invoked).

In its Response to Defendant's Motion to Dismiss, Plaintiff inverts this analysis, arguing that the Administrative Orders Review Act comes into play only after the court applies Step One of the *Chevron* analysis and concludes that the statute is ambiguous or silent as to the disputed issue. Even then, Plaintiff asserts, limitations on the court's review power are effective only if the action is a "direct attack against the FCC's rules to actually strike them down." (Pl. Resp. 17-18.) Under Plaintiff's approach, a finding that the TCPA is unambiguous regarding unsolicited fax advertisements obviates any need to resort to the FCC's interpretation. Plaintiff cites several cases in support of its analysis, but each of them is distinguishable from this case. (*Id.* 14-15.) In *Bell Atlantic Mobile, Inc. v. Dept. of Pub. Util. Control*, 253 Conn. 453, 754 A.2d 128 (Conn. 2000), the Connecticut Supreme Court addressed whether certain amendments to the Telecommunications Act preempted the state's ability to require cellular service providers to contribute to its universal telephone service program. Unlike Plaintiff in the case before this court, the appellant in *Bell Atlantic Mobile* was not challenging an FCC interpretation of a federal statute, but rather had appealed from a state agency's decision upholding that agency's power to impose universal service assessments on interstate cellular service providers. The state agency's decision was based on both the language of the Telecommunications Act itself and an FCC order adopting the recommendations of a federal-state joint board convened pursuant to the amended Act. The Connecticut Supreme Court, applying *Chevron*, considered the FCC's ruling only to note that it supported the state agency's interpretation that state regulation was not preempted. *Id.* at 481, 481

n.14, 754 A.2d at 144. The court did not consider the applicability of the Administrative Orders Review Act because the plaintiff challenged the action of a state agency as preempted by a federal statute; the FCC's interpretation was not directly at issue.

In *Witzner v. Iridex*, No. 05 Civ. 1254, 2006 U.S. Dist. LEXIS 44317, 2006 WL 1851441, at *1 (E.D.N.Y. June 29, 2006), also cited by Plaintiff, the magistrate judge recommended that the district court invalidate the EBR exemption as contrary to congressional intent, but made no mention of the Administrative Orders Review Act in its analysis. 2006 U.S. Dist. LEXIS 44317, [WL] at *7-*8. The court relied primarily on a Tenth Circuit decision applying the standard recited in the APA for general judicial review of agency decisions. *Id.* (citing *Mainstream Mktg. Servs., Inc. v. Federal Trade Comm'n*, 358 F.3d 1228, 1248 (10th Cir. 2004)). The magistrate judge failed, however, to consider the APA's provision excluding its application where a statute explicitly precludes review or where a statute specifies a particular court as the appropriate court of review for a particular subject matter. 5 U.S.C. §§ 701(a), 703. In the case of the TCPA, the Administrative Orders Review Act and § 402(a) explicitly identify the courts of appeals as having exclusive authority to determine the validity of FCC final orders.[4]

Plaintiff's remaining authorities similarly fail to consider the jurisdictional bar posed by the Administrative Orders Review Act or else have reconsidered their original position since Plaintiff filed its response brief. *Leckler v. Cashcall, Inc.* ("*Leckler I*"), 554 F. Supp. 2d 1025 (N.D. Cal. 2008), cited by

Plaintiff for its "sound reasoning," was vacated in November 2008 once the district court became aware of the effect of the Act. *See Leckler v. Cashcall, Inc.* ("*Leckler II*"), No. C 07-04002, 2008 U.S. Dist. LEXIS 97439, 2008 WL 5000528, at *2 (N.D. Cal. Nov. 21, 2008). *Leckler II* concluded in light of the Administrative Orders Review Act that it lacked subject matter jurisdiction to review an FCC declaratory ruling on a provision of the TCPA and vacated its previous order invalidating the declaratory ruling under *Chevron. Id.* Plaintiff also accords undue weight to *Spring Spectrum, L.P. v. State Corp. Comm'n*, 149 F.3d 1058 (10th Cir. 1998), in which the Court of Appeals applied *Chevron* in considering the narrow issue of whether the district court had properly denied the plaintiff injunctive relief from the enforcement of a state agency's interpretation of a federal statute; the district court below was not confronted with the validity of the FCC's interpretation of the statute in making its ruling. *See Mountain Solutions, Inc. v. State Corp. Com'n*, 966 F. Supp. 1043, 173 F.R.D. 300 (D. Kan. 1997).

In the recently decided *Blitz v. AGEAN, Inc.*, 677 S.E.2d 1 (N.C. App. 2009), also cited by Plaintiff, the primary issue on appeal was the trial court's denial of class certification under the TCPA. The North Carolina Court of Appeals based its rejection of the EBR exemption almost entirely on a four-paragraph excerpt from a decision by the Ohio Court of Common Pleas; that decision itself failed to address the availability of an EBR defense or any other relevant FCC rulings on the TCPA. *See Blitz*, 677 S.E.2d at 6-7 (quoting *Jemiola v. XYZ Corp.*, 126 Ohio Misc.2d 68, 2003 Ohio 7321, 802 N.E.2d 745, 748-49 (Ohio Com. Pl. 2003)). (These omissions become less remarkable if one reads the full

opinion, which indicates that the defendant did not appear at the bench trial or submit any evidence in opposition to Plaintiff's TCPA claims.) Suffice it to say, this court finds the admittedly incomplete analysis of the Ohio Court of Common Pleas less than persuasive.

Finally, Plaintiff directs the court to a case from the Circuit Court of the City of St. Louis, unpublished and unavailable on Westlaw or LexisNexis, in which the municipal court invalidated the EBR exemption on the unsupported assumption that it possessed the authority to do so. *See Karen S. Little, L.L.C., v. Drury Inns, Inc.*, No. 22054-01928, at 77 (Mo. Cir. Mar 23, 2009) (Ex. A to Pl.'s Mot. for Leave to File Additional Persuasive Authority in Opp. to Def.'s Mot. for Summ. J.) Although the court recognized that the ruling in *Leckler I* had been vacated, it nonetheless invoked the reasoning in that opinion and failed to acknowledge any possible bars to subject matter jurisdiction or even to address the existence of the Administrative Orders Review Act.

Despite these and similar cases that make no mention at all of the Administrative Orders Review Act, this court agrees with the Eighth Circuit that, "[i]t is hard to think of clearer language [than 28 U.S.C. § 2342] confining the review of regulations to the Courts of Appeal." *United States v. Any and all Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir.2000), *cert. denied*, 531 U.S. 1071, 121 S. Ct. 761, 148 L. Ed. 2d 663 (2001). More importantly, Plaintiff's approach is contrary to Seventh Circuit and other federal precedent regarding challenges to FCC orders. In *GECCO*, the City of Peoria brought an action in the Central District of Illinois to invalidate an FCC rule

limiting cable franchise fees to three percent of gross revenues. *See* 690 F.2d at 118. The City did not participate in the original rule-making process but sought to have the rule declared invalid some years later, when its application affected Peoria's franchise agreement with the defendant. On appeal, the Seventh Circuit overturned the district court's assertion of jurisdiction over the action and its decision to hold an FCC rule invalid. *GECCO*, 690 F.2d at 119. The court wrote,

> Peoria's action against GECCO to declare the FCC's rule invalid was brought in the wrong court at the wrong time against the wrong party. Proceedings for judicial review of final orders of the FCC . . . may be brought only in a federal court of appeals. Administrative Orders Review Act, 28 U.S.C. s 2342(1); Communications Act of 1934, as amended, 47 U.S.C. ss 402(a),(b). If the party seeking review was not a party to the FCC's rulemaking proceeding, as the City of Peoria was not, it cannot get review by the court of appeals without first petitioning the FCC to reconsider the rule, 47 U.S.C. s 405, or at least, as we shall see, without seeking some kind of remedy from the agency.

Id. Similarly, in *Biggerstaff*, the D.C. Circuit Court of Appeals addressed a party's challenge to the 1992 Report and Order's creation of an EBR exemption. While the court concluded the party had standing to challenge the exemption, it nonetheless refused to consider the exemption's validity because the party had failed to petition the FCC prior to seeking judicial review:

> A procedural hurdle bars our consideration of Biggerstaff's contention that the court should set aside the 1992 administratively-created EBR exemption because the Commission lacked authority to adopt it. Biggerstaff has not petitioned for a rulemaking to modify the 1992 EBR exemption, which "ordinarily" is "the appropriate way in which to challenge a longstanding regulation on the ground that it is 'violative of statute.'"

511 F.3d at 181-82 (quoting *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1214, 319 U.S. App. D.C. 128 (D.C.Cir.1996)). This procedure applies equally whether the petitioner "wants to challenge the rule directly . . ., or indirectly, by suing someone who can be expected to set up the rule as a defense to suit." *GECCO*, 690 F.2d at 119; *cf. United States v. Dunifer*, 219 F.3d 1004, 1007 (9th Cir. 2000) ("By its terms, the Communications Act's jurisdictional limitations apply as much as to affirmative defenses as to offensive claims.").

Finally, the court is mindful of the policy considerations behind the Administrative Orders Review Act. As the Eighth Circuit has noted, assigning exclusive jurisdiction in the courts of appeals "insures that review will be vested in an appellate panel and not in a single district judge," "guarantees that agency action will be reviewed on the basis of the administrative record rather than a district judge's de novo fact-finding," and "avoids the possibility of conflicting litigation where two courts have concurrent jurisdiction to resolve the same issues." *Southwestern Bell Tel. v. Ark. Pub. Serv.*, 738 F.2d 901, 906-07 (8th Cir.1984), *vacated and*

remanded on other grounds, 476 U.S. 1167, 106 S. Ct. 2885, 90 L. Ed. 2d 973 (1986). These considerations furnish valid support for the Administrative Review Act's restriction on judicial review of FCC regulations.

The EBR Exemption Is a "Final Order" for Hobbs Act Purposes

Plaintiff next argues that the EBR exemption does not qualify as a "final order" within the meaning of the Administrative Orders Review Act. Again, the court is unconvinced. In *Gottlieb v. Carnival Corporation*, cited by Plaintiff, the court initially invalidated the FCC's interpretation of the TCPA as unreasonable, giving only cursory attention to the preliminary question of proper jurisdiction. Specifically, the court concluded that an "interpretation" is not equivalent to a "ruling" or "order" that may only be challenged under § 2342. 595 F. Supp. 2d 212, 219 n.5 (E.D.N.Y. 2009). The court noted that the FCC's interpretation "was not incorporated into the final rules" published in October 1992, which provided an exemption only for telephone calls, not fax advertisements. *Id.* at *4. Since then, the *Gottlieb* court has reconsidered its analysis and concluded that it "overlook[ed] some relevant authority." *Gottlieb v. Carnival Corp.*, 635 F. Supp. 2d 213, 2009 U.S. Dist. LEXIS 69436, No. 04-4202, 2009 WL 2151336, at *3 (E.D.N.Y. July 21, 2009). Reversing its original decision, the court most recently held that it "did not have jurisdiction to invalidate the EBR exemption and must apply it as if it were part and parcel of the TCPA." *Id.*

Contrary to Plaintiff's unsupported reasoning, it is not "[t]he particular label" assigned by the FCC that

determines whether a decision is an order, but the "substance of what the Commission has purported to do and has done which is decisive." *Columbia Broadcasting*, 316 U.S. at 416 (1942). In *Columbia Broadcasting*, the Court defined orders reviewable under § 402(a) as distinct from other agency action insofar as such orders "are 'an exercise either of the quasi judicial function of determining controversies or of the delegated legislative function of rate making and rule making'." *Id.* at 420 (quoting *United States v. Los Angeles & S.L.R.*, 273 U.S. 299, 309-10, 47 S. Ct. 413, 71 L. Ed. 651 (1927). Both *GECCO* and *Biggerstaff* applied this principle in recognizing the EBR exemption as a "final order" for the purposes of review under the Administrative Orders Review Act, and other federal courts have followed this approach in analogous circumstances, as we do here. *GECCO*, 690 F.2d at 119 (holding that FCC rules are final orders governed by § 402(a)); *Biggerstaff*, 511 F.3d at 184-85 (applying § 402(a) and § 2342 to review of the EBR exemption); *see US West Commnc'ns*, 224 F.3d at 1054 ("agency orders are 'final orders' for the purposes of the Administrative Orders Review Act 'if they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.'" (citing *Sierra Club v. United States Nuclear Regulatory Comm'n*, 862 F.2d 222 (9th Cir.1988)); *Leckler II*, 2008 U.S. Dist. LEXIS 9743, 2008 WL 5000528, at *3 (agency decision is a "final order" where it is the final decision interpreting a statutory provision and "determines legal rights and obligations.")

The FCC's EBR exemption, though never codified in the Code of Federal Regulations ("C.F.R."), nonetheless meets the definition of a "final order." First, the

assertion of the EBR exemption as a defense undoubtedly affects the rights of the parties in this suit. Depending on the exemption's validity and applicability to the facts, Defendant may either successfully assert it as a defense or else be subject to potential liability for sending unsolicited faxes without Plaintiff's express consent. Second, the history of the exemption, already discussed, reflects the FCC's intention to exercise its delegated rule-making authority in creating the exemption. Following notice and comment, the FCC promulgated the 1992 Report and Order, stating, "[F]acsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient." 1992 Report and Order, app. B, 7 F.C.C.R. at 8779 P 54, n.87, 1992 WL 690928, at *23. The FCC reaffirmed this interpretation in the 1995 Report and Order and again in the 2003 Report and Order, in which it proposed to eliminate the exemption. *See* 10 F.C.C.R. at 12408 P 37; 18 F.C.C.R. at 14127 P 189. In a ruling delaying the effective date of the 2003 Report and Order, the FCC explained,

> [w]e emphasize that our existing TCPA rules prohibiting the transmission of unsolicited advertisements to a telephone facsimile machine will remain in effect during the pendency of this extension. Under these rules, those transmitting facsimile advertisements must have an established business relationship or prior express permission from the facsimile recipient to comply with our rules.

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 47 C.F.R. Part 64

(2004). In sum, the FCC has consistently recognized an EBR exemption to fax advertisements, beginning with the 1992 Report and Order and continuing through the enactment of the JFPA in 2005.

In addition to the FCC's own statements and actions, numerous federal courts have also recognized the EBR exemption as a valid final order prior to the enactment of the JFPA. A court in this district, interpreting the JFPA, acknowledged that prior to the JFPA's passage, "it would have been lawful for [the defendant] to send [an unsolicited fax] advertisement if it had an established business relationship with [the plaintiff]." *Eclipse Mfg. Co. v. M and M Rental Ct., Inc.*, No. 06 C 1156, 2006 U.S. Dist. LEXIS 39943, 2006 WL 1547993, at *4 (N.D. Ill. May 26, 2006) (Bucklo, J.) Similarly, in *Accounting Outsourcing, LLC v. Verizon Wireless Personal Comme'ns, L.P.*, the Middle District of Louisiana noted, "For over ten years, the FCC's rule was that an established business relationship was deemed to be invited or permitted by the recipient" with respect to fax advertisements. 329 F. Supp. 2d 789, 808 (M.D. La. 2004); *see also Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 896-97 (W.D. Tex. 2001) (acknowledging the applicability of the FCC's EBR exemption to the general prohibition on sending interstate fax advertisements). At least one state court has reached a similar conclusion. *See Carnett's, Inc. v. Hammond*, 279 Ga. 125, 127 n.18, 610 S.E.2d 529, 531 n.18 (2005) (recognizing that state courts do not have jurisdiction to review final orders of federal agencies and must accept the FCC's EBR exemption as valid (citing 28 U.S.C. § 2324)). In sum, courts over the years have accepted and applied the EBR exemption as a valid agency rule that affects the legal rights of parties

to suit. It therefore meets the definition of a "final order" for purposes of the Administrative Orders Review Act.

Plaintiff Has Asked This Court To Determine the Validity of the EBR Exception

Finally, Plaintiff contends that it is not asking this court "to enjoin, set aside, suspend . . . or to determine the validity of" any FCC order because this is "a civil case between two parties" that will have no effect on the FCC. (Pl. Resp. at 14-15, 18.) Plaintiff cites several cases that purportedly support this position. First, Plaintiff relies on *WH Link, L.L.C. v. City of Otsego*, 664 N.W.2d 390 (Minn. App. Ct. 2003) as an example of a case where a state court of appeals concluded it had jurisdiction to rule on plaintiff's preemption claims despite their conflict with certain FCC regulations. *Id.* at 394. The issue in *WH Link*, however, was preemption, and the court properly concluded that it had jurisdiction over any issues that Congress had not specifically directed to the FCC and, further, that the resolution of those issues did not require "interpretation of any FCC rule or regulation." *Id.*

Plaintiff's reliance on *Cincinnati Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 12 Ohio St. 3d 280, 12 Ohio B. 356, 466 N.E.2d 848 (Ohio 1984), is equally misplaced. In that case, the court, addressing the validity of an FCC preemption order, relied entirely on a four-paragraph excerpt from an Eastern District of Arkansas case, later reversed. *See Southwestern Bell Tel. Co. v. Ark. Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984), *reversed by*, 738 F.2d 901 (8th Cir. 1984), *vacated on other grounds by*, 476 U.S. 1167, 106 S. Ct. 2885, 90 L.

Ed. 2d 973 (1986). The court of appeals reversed the district court's decision in *Southwestern Bell* in part because it concluded the district court lacked jurisdiction under the Administrative Orders Review Act to declare certain FCC preemption orders as invalid. *Id.* at 906. The court specifically rejected the lower court's reasoning that a suit between private parties will not constitute an action "to enjoin or set aside an agency order," noting that "[w]here the practical effect of a successful attack on the enforcement of an order involves a determination of its validity, the statutory procedure for review provided by Congress remains applicable." *Id.* The court also pointed out that six other district courts had "properly declined to review the Order's validity." [5] *Id.* at 906 n.11.

As explained above, when a suit between private parties asks a court to consider the FCC's authority to promulgate an order in deciding whether or not to apply that order, it in effect requests the court to rule on that order's validity. *See GECCO*, 690 F.2d at 119 (suit against private party seeking to invalidate FCC order should have been brought against FCC in proceeding for judicial review before court of appeals). "Plaintiffs cannot avoid the proscriptions of Section 402 by claiming that they are not facially challenging the FCC's general delegation policy, but only its application" to the circumstances of a specific case. *Am. Bird Conservancy v. F.C.C.*, 408 F. Supp. 2d 987, 991 (D. Hawaii 2006); *see also Wilson v. A.H. Belo*, 87 F.3d 393 (9th Cir. 1996) ("A complaint [to recover alleged overcharges for political advertising in violation of the Communication Act] need not be a collateral attack on a declaratory ruling [of the FCC] for 28 U.S.C. § 2342 to

vest exclusive jurisdiction in the court of appeals. All that is required is that the complaint filed in the district court raise the same issues and seek the same relief in substance as the declaratory ruling.") Despite Plaintiff's protestations that it is not seeking to invalidate the EBR exemption, this court cannot see how declining to apply the EBR exemption on the ground that the FCC exceeded its rulemaking authority differs from a declaration that the exemption is invalid. This court may consider whether the EBR exemption applies to the particular facts of this case, but it lacks the jurisdiction to consider its validity as a rule.

The EBR Exemption Applies to Faxes Sent to Businesses

Having determined that the court must accept the EBR exemption as a valid final order, the court at last turns to the question of its applicability to the parties in this case. Plaintiff argues that the FCC intended the rule to apply only to faxes sent to residences, not to businesses, and asserts that the court may ignore the EBR exemption because Plaintiff is a business subscriber under the TCPA. In support, Plaintiff cites the following definition of an "established business relationship" from the 1992 Report and Order:

> The term "established business relationship" means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a *residential subscriber* with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the *residential subscriber* regarding products or services offered by such

> person or entity, which relationship has not been previously terminated by either party.

1992 Report and Order, app. B, 7 FCC Rcd at 8793 (emphasis added). Because this definition refers only to residential subscribers, Plaintiff contends that the defense did not apply to business subscribers until the JFPA took effect in 2005. (Pl. Resp. at 19-20.) In the 1992 Report and Order, the term "residential subscriber" is not defined, and "business subscriber" does not appear at all. Plaintiff contends that the language of the JFPA confirms the distinction: the JFPA amended the FCC's original language by adding a provision describing an EBR as "a relationship between a person or entity and a *business subscriber*", 47 U.S.C. § 227(a)(2)(A) (emphasis added), and subsequently, the FCC incorporated this language as part of its rules in defining an EBR for the purposes of sending unsolicited fax advertisements:

> For purposes of paragraph (a)(3) of this section, the term established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

47 C.F.R. §§ 64.1200(f)(5).

Defendant counters that the section cited by Plaintiff applies only to a specific provision of the 1992 Report and Order dealing with "using an artificial or prerecorded voice" in calls placed to residential telephone lines. (Def. Reply at 6-7.) The language quoted by Plaintiff appears in Appendix B of the 1992 Report and Order in which the FCC published the implementing regulations for inclusion in the Code of Federal Regulation. 1992 Report and Order, app.B, 7 FCC Rcd at 8790. This definition of an EBR is necessarily limited to residential subscribers, Defendant notes; it appears in the section addressing the prohibition on calls to residences and is thus logically "a defense to a claim that can be brought only by residential subscribers." (Def. Reply at 6-7.) Indeed, Plaintiff's definition of EBR is preceded by the limiting words "[a]s used in this section" and appears under the heading "Subpart L-Restrictions on Telephone Solicitation." *Id.* at 8790, 8792.

The only mention of an exemption for fax advertisements in the 1992 Report and Order appears in a footnote and states that "facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient." 7 F.C.C.R. at 8784. The footnote does not further characterize the "recipient" as either a residential or a business subscriber. The court notes that for the most part, the 1992 Report and Order deals with issues involving unsolicited telephone calls to residences. The Report's "Background" section explains that the FCC has chosen to "exempt from the prohibition on prerecorded or artificial voice message calls to residences those calls . . . [that are] made to a party with whom the caller has an

established business relationship," but does not mention fax machines. *Id.* at 8755. In fact nearly all of the language outlining the definition and scope of an EBR appears in a section of the Report labeled "Exemptions to Prohibited Uses of Artificial or Prerecorded Messages," a section that focuses primarily on "prerecorded message calls to residences." *Id.* at 8770. Nonetheless, in the midst of this discussion, the FCC states a preference for defining the term "business relationship" broadly and, in keeping with this preference, defines "established business relationship" as "a prior or existing relationship formed by a voluntary two-way communication between the caller and the called party, which relationship has not been previously terminated by either party." *Id.* at 8771. Although this is not the definition that appears in the C.F.R., it does suggest that the FCC did not intend to restrict "business relationships" only to residential subscribers under the rules. The Report goes on to explain, "A broad definition of the business relationship can encompass a wide variety of business relationships (e.g., publishers with subscribers, credit agreements) without eliminating legitimate relationships not specifically mentioned in the record." *Id.*

Defendant's broad interpretation of the scope of the EBR exemption finds additional support in later FCC statements. Like the 1992 Report and Order, the 1995 Report and Order eschews any kind of residential limitation in its discussion of fax solicitations. *See* 10 F.C.C.R. at 12408 ("The [1992] Report and Order makes clear that the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions.") In 2001, the FCC issued a Public Notice titled *FCC Reminds*

Consumers About "Junk Fax" Prohibition in which it stated, "The prohibition [on unsolicited advertisements] applies to unsolicited advertisements transmitted *to both businesses and residences* . . . An established business relationship, however, demonstrates consent to receive fax advertisement transmissions." 16 F.C.C.R. 4524 (Feb. 20, 2001) (emphasis added). The 2003 Report and Order similarly recognized that the EBR exemption had until that time been "sufficient to show that an individual *or business* has given their express permission to receive unsolicited facsimile advertisements." 18 F.C.C.R. at 14127 (emphasis added). While the FCC has not always specified precisely to whom the EBR exemption should apply, it has expressed a clear preference for reading the definition of an EBR broadly, and the court defers to this preference. See 1992 Report and Order, 7 F.C.C.R. at 8770-71. Finally, the court finds Defendant's contention that "the FCC's interpretation is consistent with common sense" persuasive: "Why would the FCC afford greater protection from unwanted faxes to business subscribers than to residential subscribers?" (Def. Reply at 8.)

The EBR Exemption Applies to the Relationship Between the Parties

Under the current FCC rules, the burden rests "on the sender to show that it has a valid EBR with the recipient." Rules and Regulations, 71 Fed. Reg. 25,967 (May 3, 2006). In its Motion for Summary Judgment, Defendant has produced extensive, unrebutted documentation of its relationship with Plaintiff: Plaintiff was a subscriber to three of Defendant's publications as of August 23, 2004, the date Defendant sent the

unsolicited fax, and had repeatedly renewed its subscriptions over the years. Nor has Plaintiff presented evidence that it at any time sought to unsubscribe from Defendant's publications or to terminate its relationship with Defendant. Further, Plaintiff concedes that it "is a business subscriber as the fax number is owned and maintained by the business." (Pl. Resp. at 21.) In short, Defendant has successfully asserted its existing business relationship with Plaintiff as a complete defense to liability under the TCPA. The court therefore enters summary judgment in its favor.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment [67] is granted.

Dated: August 12, 2009

/s/ Rebecca R. Pallmeyer

REBECCA R. PALLMEYER

United States District Judge

Footnotes

1 The Complaint named "Prism Business Media, Inc." as the Defendant when this action was commenced in August 2007, although Prism had changed its name to Penton Business Media, Inc. on March 15, 2007. To avoid confusion, the court uses Defendant's name as it appears in the Complaint's caption.

2 Unless otherwise indicated, the court draws the facts of this case from the parties' Local Rule 56.1 Statements.

3 Previously, Plaintiff voluntarily dismissed, without prejudice, its claims for common law conversion and for consumer fraud under Illinois' Deceptive Business Practices Act, 735 ILCS 5/2-801. (*See* Minute Entry, Oct. 26, 2007 [Doc. 25].)

4 The court notes that *Witzner* did not proceed beyond the magistrate judge's recommendation, and thus the district court did not have the opportunity to adopt or reject its opinion.

5 On grant of certiorari, the Supreme Court vacated the Eighth Circuit's decision in light of its holding in *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986), in which the Court concluded that the FCC had indeed exceeded its statutory authority in issuing the preemption order at issue.

Filed: 8/12/09
No. 07 C 5838

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

CE DESIGN LTD.,.Plaintiff,

v.

PRISM BUSINESS MEDIA, INC., Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Defendants motion for summary judgment is granted.

Michael W. Robbins, Clerk of Court
s/Ena T. Ventura, Deputy Clerk

Filed 7/26/2010
No. 09-3172
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CE DESIGN, LIMITED, an Illinois corporation, individually and as the representative of a class of similarly situated persons, Plaintiff-Appellant,

v.

PRISM BUSINESS MEDIA, INCORPORATED, Defendant-Appellee.

Before FLAUM, KANNE, and EVANS, Circuit Judges.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:07-cv-05838--Rebecca R. Pallmeyer, Judge.

ORDER

On June 10, 2010, the plaintiff-appellant filed a petition for rehearing and petition for rehearing en banc. All of the judges on the panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for rehearing and rehearing en banc are therefore DENIED.

In the Matter of RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

CC Docket No. 92-90

RELEASE-NUMBER: FCC 92-443

FEDERAL COMMUNICATIONS COMMISSION

September 17, 1992 Released; Adopted October 16, 1992

REPORT AND ORDER

By the Commission: Commissioner Barrett issuing a statement.

I. INTRODUCTION

1. By this action, the Commission is amending its rules and regulations to establish procedures for avoiding unwanted telephone solicitations to residences, and to regulate the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines.

II. BACKGROUND

2. This proceeding was initiated by passage of the Telephone Consumer Protection Act of 1991, Public Law 102-243, December 20, 1991, which amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 et seq., by adding a new section, 47 U.S.C. § 227 (TCPA). In its preamble, the TCPA recognizes the

legitimacy of the telemarketing industry, but states that unrestricted telemarketing could be an intrusive invasion of privacy and, in some instances, a risk to public safety. Accordingly, the TCPA imposes restrictions on the use of automatic telephone dialing systems, the use of artificial or prerecorded voice, and on the use of telephone facsimile machines to send unsolicited advertisements. Specifically, the TCPA prohibits autodialed and prerecorded voice message calls to emergency lines, any health care facility or similar establishment, and numbers assigned to radio common carrier services or any service for which the called party is charged for the call, unless the call is made with the prior express consent of the called party or is made for emergency purposes. The TCPA also prohibits calls made without prior express consent to a residence using an artificial or prerecorded voice to deliver a message, unless it is an emergency call or is exempted by the Commission. Unsolicited advertisements may not be transmitted by telephone facsimile machines. Those using such machines or transmitting artificial or prerecorded voice messages are subject to certain identification requirements. The statute outlines various remedies for violations of the TCPA. Finally, the TCPA requires that the Commission consider several methods to accommodate telephone subscribers who do not wish to receive unsolicited advertisements, including live voice solicitations.

3. The TCPA notes that, "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." TCPA at Section

2(9). The preamble of the TCPA notes that the use of telemarketing is widespread, and generates more than $ 400 billion in commercial activity each year, through more than 30,000 businesses employing more than 300,000 people. TCPA at Section 2(2)-(4).[1] Our task in this proceeding is to implement the TCPA in a way that reasonably accommodates individuals' rights to privacy as well as the legitimate business interests of telemarketers.

4. In accordance with the requirements of the TCPA, the Commission, on April 10, 1992, adopted a Notice of Proposed Rulemaking (NPRM) in this proceeding.[2] The NPRM proposed rules implementing provisions of the TCPA which place restrictions on the use of automatic telephone dialing systems and artificial or prerecorded messages. The NPRM requested comment on the proposed rules, and requested comment and analysis regarding several alternative methods for restricting telephone solicitations to residential subscribers. Approximately two hundred and forty parties, including 83 newspapers, 25 industry and trade associations, 6 consumer advocacy groups, and 17 common carriers submitted comments or reply comments in response to the NPRM. A list of those parties is contained in Appendix A.[3]

5. In this proceeding, we analyze the costs and benefits associated with each of the alternatives for meeting the goals of the TCPA. The rules we adopt attempt to balance the privacy concerns which the TCPA seeks to protect, and the continued viability of beneficial and useful business services. We adopt rules which protect residential telephone subscriber privacy by requiring telemarketers to place a consumer on a do-not-call list if

the consumer requests not to receive further solicitations.[4] Further, we adopt, as proposed: (1) the prohibitions on calls made by automated telephone dialing systems and artificial or prerecorded voice messages (in the absence of an emergency or the prior express consent of the called party) to emergency lines, health care facilities, radio common carriers or any number for which the called party is charged for the call; (2) the prohibition on artificial or prerecorded voice message calls to residences; (3) the prohibition on the transmission of unsolicited advertisements by telephone facsimile machines; (4) the requirements that telephone facsimile machines and artificial or prerecorded voice messages identify the sender of such transmissions; (5) the requirement that artificial or prerecorded voice messages release the line of the called party within 5 seconds of notification that the called party has hung up; and (6) the prohibition on calls which simultaneously engage two or more lines of a multi-line business. We exempt from the prohibition on prerecorded or artificial voice message calls to residences those calls: not made for commercial purposes; made for commercial purposes which do not transmit an unsolicited advertisement; made to a party with whom the caller has an established business relationship; and non-commercial calls by tax-exempt nonprofit organizations.

III. DISCUSSION

A. Definitions

6. Many commenters request clarification, or offer their own definitions, of terms which appear in the NPRM and the TCPA. Accordingly, definitions of the following

terms are set forth in Section 64.1200(f) of our rules, 47 C.F.R. § 64.1200(f):[5] automatic telephone dialing system ("autodialer"); established business relationship; telephone facsimile machine; telephone solicitation, and; unsolicited advertisement.[6] We emphasize that the term autodialer does not include the transmission of an artificial or prerecorded voice. As indicated in the discussion below, we decline to adopt definitions offered by commenters where such definitions fit only a narrow set of circumstances, in favor of broad definitions which best reflect legislative intent by accommodating the full range of telephone services and telemarketing practices.

B. Procedures for Avoiding Unwanted Telephone Solicitations to Residences

7. The TCPA and our rules, as adopted here, define "telephone solicitation" as the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax-exempt nonprofit organization. Definitions of the terms "prior express consent" and "established business relationship" are set forth at paras. 29-35, infra. The TCPA requires that the Commission prescribe regulations to implement procedures for protecting the privacy rights of residential telephone subscribers in an efficient, effective, and economic manner. § 227(c)(2). In determining which methods or procedures would best enable subscribers to avoid unwanted telephone

solicitations, the Commission analyzed: the respective costs and benefits of several alternatives; which public or private entities are capable of administering the available alternatives; the impact of the various alternatives on small businesses and second class mail permit holders; and whether there is a need for additional authority from Congress to further restrict telephone solicitations.[7]

1. Live vs. Artificial or Prerecorded Voice Solicitations.

8. In the NPRM, the Commission requested comment on whether it is in the public interest to recognize an inherent difference in the nuisance factor between artificial or prerecorded voice calls as opposed to live solicitations. Further, the NPRM raised the issue of whether regulation of live solicitation is necessary to protect residential subscriber privacy rights. Most commenters do not object to some form of restriction on live solicitations, but distinguish between live solicitations, particularly those made by predictive dialers (which deliver calls to live operators), and solicitations completed by artificial or prerecorded voice messages. These commenters contend that artificial or prerecorded voice solicitations are a greater nuisance and an invasion of privacy, and cite the relatively greater number of complaints to the Commission about this specific mode of solicitation to support this claim.[8] Several commenters, however, cite legislative history in asserting that Congress intended to regulate all solicitations, whether live or artificial or prerecorded voice, because both types of unwanted solicitations represent a nuisance and an invasion of privacy.[9] These commenters note that the figures on consumer complaints received by the Commission,

suggesting that live solicitations are much less intrusive, do not fully reflect the volume of complaints regarding live solicitations because not all such complaints are reported directly to the Commission.[10]

9. While the commenters demonstrate that there are separate privacy concerns associated with artificial or prerecorded solicitations as opposed to live operator solicitations (e.g. calls placed by recorded message players can be more difficult for the consumer to reject or avoid), the record as a whole indicates that consumers who do not wish to receive telephone solicitations would object to either form of solicitation. We are persuaded by the comments, the numerous letters from individuals, and the legislative history that both live and artificial or prerecorded voice telephone solicitations should be subject to significant restrictions.[11] Accordingly, as discussed below, we select company-specific do-not-call lists as the most effective alternative to protect residential subscribers from unwanted live and artificial or prerecorded voice message solicitations. For the reasons discussed below, we believe that this alternative most effectively balances the privacy interests of residential subscribers who wish to avoid unwanted solicitations (whether live or by artificial or prerecorded message) against the interests of telemarketers in maintaining useful and responsible business practices and of consumers who do wish to receive solicitations.[12]

2. Alternatives to Restrict Telephone Solicitation to Residences.

10. As directed by the TCPA, the Commission has considered a number of alternatives for residential

telephone subscribers to avoid receiving unwanted telephone solicitations. These include a national database, network technologies, special directory markings, time of day restrictions, and industry-based or company-specific do-not-call lists. The NPRM requested comment, as well as focused cost/benefit analyses, of these and any other methods proposed for protecting the privacy of residential telephone subscribers.

11. National Database. A majority of the commenters oppose this option because a national database of consumers who do not wish to receive telemarketing calls would be costly and difficult to establish and maintain. Estimates to start and operate a national database in the first year ranged from $20 million to $ 80 million, with commenters agreeing that operations would cost as much as $ 20 million annually in succeeding years.[13] The American Express Company (AMEX) asserts that the Commission's original estimates did not include the costs of educating consumers about the database, gathering and disseminating the data, and regularly updating the database. Several commenters, noting that businesses participating in state do-not-call databases pay as much as $ 1,500 annually, contend that many small businesses simply may not be able to afford participation in a national database.[14] Commenters assert that for most small businesses, participation would require an investment in computer software and hardware if the database were to be available on floppy disk, or would require additional personnel to review lists if a paper version of the list were made available to small businesses.[15] Many commenters express concern that consumers, as well as telemarketers, would ultimately

bear the costs of a national database, either through higher prices charged by telemarketers or through costs incurred by a national database administrator and not recovered through fees on telemarketers. Further, several commenters question how participation in a national database would be enforced against telemarketers.[16]

12. Numerous commenters argue that consumers would be disappointed in a national database because they would still receive unwanted calls after placing themselves in the national database, either because there will be a time lag in getting their preferences to telemarketers or because they would still receive calls from exempted businesses or organizations.[17] See paras. 32-41, infra. They note that since nearly one-fifth of all telephone numbers change each year, any database, whether local, regional, or national, would be continuously obsolete and would require constant updates in order to remain accurate.[18] Commenters assert that quarterly or semiannual updates would not be sufficiently frequent to avoid obsolescence or to accommodate consumer expectations.[19] AT&T states that a national database would contain millions of names and addresses, and that at least 20 percent of those would change every year as people move, change telephone numbers, disconnect service, or simply decide to enter or leave the database. Commenters also oppose this option because consumers must make an all or nothing choice: either reject all telemarketing calls, even those which the consumer might wish to receive, or accept all telemarketing calls, including those which the consumer does not wish to receive.[20] Moreover, several commenters question whether the confidentiality of telephone subscriber information

could be adequately protected if it were maintained on a widely accessible list, and note that such information could be misused to compile telemarketing lists.[21] Other commenters contend that a national do-not-call database would destroy the confidentiality of subscribers having unpublished or unlisted numbers.[22]

13. Commenters who support the creation of a national do-not-call database contend that it is the most efficient and effective means for avoiding unwanted telephone solicitations. Lejeune Associates and CSC contend that the do-not-call database which Lejeune currently operates in Florida could easily be expanded to form a national do-not-call database. CSC and OPUC suggest that an independent organization (such as the National Exchange Carrier Association or a telemarketing trade association) could administer a national database perhaps under the supervision of a board of governors from government, the industry, and the public. Consumer Action envisions a system in which all telemarketers would send their calling lists to a third party administrator who would compare and remove all names which appear on the administrator's national do-not-call database. It maintains that such a system would allow participation by subscribers with unpublished numbers, and would lower the risk of breaches in subscriber confidentiality. The Independent Telecommunications Network (ITN) suggests that the Line Information Database (LIDB) currently maintained by local exchange carriers (LECs) could be used to register subscriber do-not-call preferences nationwide, and could be accessed by telemarketers with the proper equipment for a minimal fee for each query.

14. Upon careful consideration of the costs and benefits of creating a national do-not-call database, we believe that the disadvantages of such a system outweigh any possible advantages. A national database would be costly and difficult to establish and maintain in a reasonably accurate form. As noted above, the most conservative estimates assume costs of $ 20 million in the first year of operation alone. The impact of the costs of retooling or hiring additional personnel for compliance would be greater on small or start-up businesses. Moreover, the greater these costs to smaller entities, the more likely that such costs would be passed on to consumers.[23] Telemarketers' only means of making up the difference, given the absence of federal involvement in the establishment, operation, or maintenance of a national database, would be to pass along such costs to consumers.[24] Commenters supporting a national database suggest that it be updated at least every three months. However, frequent updates would increase costs for both the database administrator and telemarketers. In addition, many commenters point out that each update would increase the potential for error in publishing or recording the telephone numbers of consumers requesting placement on the list. Regional or local telemarketers could be required to purchase a national do-not-call database even if they made no solicitations beyond their states or regions; additional rules to compensate for such varied telemarketing practices would, as with small businesses, increase the complexity and cost of implementing a national database. Additionally, commenters indicate that on-line computer databases present significantly greater technological difficulties.[25]

15. We are persuaded by the comments that a national database which includes information in addition to telephone numbers (for greater accuracy and for verification purposes) could make national database information a target for unscrupulous telemarketers, and would present problems in protecting telemarketer proprietary information. A national database would similarly risk the privacy of telephone subscribers who have paid to have unpublished or unlisted numbers. While a national database would serve those who wish to avoid all telemarketing calls, commenters point to the success of telemarketing as proof that telephone subscribers by and large would like to maintain their ability to choose among those telemarketers from whom they do and do not wish to hear.[26] In view of the many drawbacks of a national do-not-call database, and in light of the existence of an effective alternative (company-specific do-not-call lists), we conclude that this alternative is not an efficient, effective, or economic means of avoiding unwanted telephone solicitations.

16. Network Technologies. Most commenters oppose this option because they contend that it is not technologically feasible and is too costly.[27] The use of a special area code or telephone number prefix for telemarketers, for example, requires the called party to be provided with a means to reject telephone solicitations by using automatic number identification (ANI) or a Caller ID service to block calls from a designated telemarketer prefix. Commenters concur that the SS7 technology which facilitates call blocking is costly to deploy; that the SS7 technology is not available to all telephone subscribers in all areas of the nation; that the North American Numbering Plan (NANP) may lack sufficient numbers to set aside an

entire prefix for telemarketers; and that a service blocking all telemarketer calls would force consumers to sacrifice any choice between telemarketers from which they do and do not wish to hear.[28] Even if this option were feasible, commenters argue that businesses would have to change their telephone numbers and all references to those numbers in every medium, which would be prohibitively expensive. Moreover, businesses may decide to invest in separate telephone lines for telemarketing to customers with an ongoing business relationship, an expense smaller enterprises perhaps could not afford.[29] GTE Service Corporation (GTE), SNET, and U.S. West express concern that exchange carriers would be required to finance the implementation of this option, when telemarketers alone should bear the costs of protecting subscribers from unwanted telephone solicitations. Commenters concur that any ubiquitous call blocking system would require costly switch upgrades by LECs to accommodate the SS7 technology which permits call blocking.[30] In contrast, InterVoice and ITN argue that much of the infrastructure necessary to implement call blocking network technology nationally is already in place, and that this technology is an effective means for avoiding unwanted solicitations.

17. In view of the costs and technological uncertainties associated with implementation, we reject the network technologies alternative for avoiding unwanted telephone solicitations. This alternative would ultimately place the cost of consumer privacy protection on telemarketers, local exchange carriers, and consumers alike. The more than 30,000 businesses engaged in telemarketing would be required to incur costs associated with changing their telephone numbers

to numbers which carry a telemarketing prefix, and would perhaps be forced to obtain new lines for conducting operations other than solicitations. All LECs would be forced to upgrade their networks without regard to demand for technology. Moreover, it is unclear whether fees on telemarketers would be sufficient to cover the costs of making call blocking technology universally available, raising the possibility that such costs would be passed on to residential telephone subscribers, in violation of the TCPA. Based on the commenters' assessments of the cost and technological barriers to implementation of this alternative, we conclude that network technologies are not the best means for accomplishing the objectives of the TCPA at this time.

18. Special Directory Markings. A majority of commenters oppose this alternative because it would require telemarketers to purchase and review thousands of local telephone directories, at great cost and to little ultimate effect. Commenters note, for example, that telemarketing firms compile calling lists from many sources other than local telephone directories.[31] Hence, many telemarketers would not ordinarily discover a subscriber's do-not-call preference in the process of targeting likely prospects. Commenters argue that this alternative has many of the disadvantages of the national database option, because subscribers would have to make an all or nothing choice about receiving telemarketing calls, and subscribers would be disappointed at the time lag in entering their preference, during which they would continue to receive unwanted calls. Moreover, since directories are published only once a year, the subscriber preference information would quickly

become obsolete, and telemarketers would pay enormous costs to access any computerized telephone directories.[32] Commenters also argue that special directory markings would not permit subscribers with unpublished or unlisted numbers to avoid telephone solicitations.[33] BellSouth and Consumer Action argue that this option unfairly divides responsibility for curbing unwanted calls between LECs and telemarketers, when telemarketers alone should bear any relevant costs or administrative burdens.[34] Moreover, U.S. West contends that disappointed subscribers will seek relief from the LEC rather than an offending telemarketer if preferences are not respected or are not communicated to telemarketers in a timely fashion.

19. We agree with commenters that this alternative would be too costly and burdensome for telemarketers to implement efficiently, regardless of their size, especially given the existence of an effective alternative (company-specific do-not-call lists). Such a system would rely on much obsolete information and could not be updated in a timely fashion. Significantly, implementation of special directory markings would place much of the burden of cost and implementation on LECs, which could not pass on such costs to residential telephone subscribers because the TCPA prohibits charges to consumers for privacy protection. § 227(c)(2). Unpublished and unlisted numbers could not be included in such a system. Ultimately, this option combines the disadvantages of maximum cost to all participants with minimal potential effectiveness, and therefore is not a suitable means of accomplishing the goals of the TCPA.

20. Industry-Based or Company-Specific Do-Not-Call Lists. A majority of commenters support company-specific do-not-call lists as the most effective, most easily implemented, and the least costly of each of the methods proposed to curb unwanted telephone solicitations.[35] Commenters supporting this approach state that the company-specific do-not-call list alternative appropriately places the burden of compliance squarely on telemarketers.[36] These commenters view this method as less costly and less burdensome because many telemarketers already maintain company-specific do-not-call lists, and because most telemarketers can readily verify and compare subscriber information with information drawn from their own customer lists.[37] Commenters favoring this option note several reasons for implementing it: (1) it is effective in halting unwanted solicitations; (2) it accords greater recognition of consumer privacy interests than a national database or special directory markings; (3) it eliminates anticompetitive concerns in special directory markings or a national database, in which phone companies could have access to proprietary information; (4) it allows desired solicitations; (5) it places costs squarely on telemarketers, yet avoids undue costs or restrictions for telemarketers; (6) it avoids burdening Commission resources; and (7) it appropriately balances legitimate privacy expectations against legitimate uses of telemarketing.[38]

21. In response to our observation in the NPRM that telemarketers would be required to produce evidence of compliance with any requirement mandating company or industry-based do-not call lists, several commenters suggest that telemarketers be required to follow certain guidelines for maintaining such lists. For

example, commenters propose that telemarketers be required to: (1) maintain a written policy implementing its do-not-call procedures; (2) inform and train telemarketing representatives in the existence and implementation of the company-specific do-not-call list; (3) inform subscribers of their rights to be placed on such a list; (4) place a telephone subscriber on a do-not-call list within reasonable time after the request is made (or not later than 60 days); and (5) maintain the request for a reasonable period after the request is made.[39] Commenters assert that telemarketers who can certify and demonstrate compliance with the above should be afforded a legal presumption of compliance with the rules and allowed to use such demonstration as a defense in any private or Commission enforcement action.[40] A few commenters propose that telephone subscribers be notified of Commission policy and telemarketer procedures through telemarketer mailings, local subscriber phone directories, news, bill inserts, or in a live preamble prior to solicitation.[41] Some commenters propose that residential subscribers be given the option of contacting DMA, which maintains an industry-based do-not-call list (through its Telephone Preference Service), in lieu of contacting numerous companies individually.

22. Commenters opposed to industry-based or company-specific do-not-call lists contend that existing industry-based and company-specific lists have not reduced the number of unwanted telephone solicitations, and that Congress has found such efforts ineffective.[42] Further, these commenters argue that these alternatives provide no affirmative method for the consumer to avoid or reject a telemarketer's first call in advance. Moreover, Private Citizen, Inc. (Private

Citizen) contends that telemarketers do not always heed an initial do-not-call request, and may call a consumer several times before honoring a consumer's request not to receive further calls or solicitations.

23. The legislative history suggests that properly implemented company-specific do-not-call lists would satisfy the statutory requirements of the TCPA.[43] In light of that assertion, and upon weighing the costs and benefits of company-specific and industry-based do-not-call lists against the costs and benefits of the other alternatives presented in the record, we conclude that the company-specific do-not-call list alternative is the most effective and efficient means to permit telephone subscribers to avoid unwanted telphone solicitations.[44] Such lists are already maintained on a voluntary basis by many telemarketers and could be established swiftly by individuals, small businesses, or large companies. Mandatory company-specific do-not-call lists would allow residential subscribers to selectively halt calls from telemarketers from which they do not wish to hear. Such lists would also afford residential telephone subscribers with a means to terminate a business relationship in instances in which they are no longer interested in that company's products or services. Additionally, businesses could gain useful information about consumer preferences, and can comply with such preferences without overly burdensome costs or administrative procedures. This alternative would best protect residential subscriber confidentiality because do-not-call lists would not be universally accessible, and could be verified with a telemarketer's own customer information. Company-specific do-not-call lists would impose the costs of protecting consumer privacy squarely on telemarketers rather than telephone

companies or consumers who do not wish to be called. Moreover, the costs of maintaining a do-not-call list are less likely to be passed on to residential telephone subscribers even indirectly, because they would be minimal, involving only the addition of do-not-call preferences to existing calling lists.[45] Such lists are more likely to be accurate than a national database because a single party would be responsible for recording and maintaining do-not-call requests, and that party could verify a consumer's identification with its own customer information. In sum, the company-specific do-not-call list alternative represents a careful balancing of the privacy interests of residential telephone subscribers against the commercial speech rights of telemarketers and the continued viability of a valuable business service. For these reasons, we conclude that the company-specific do-not-call list is the alternative that best accomplishes the purposes of the TCPA.

24. The comments persuade us that we must mandate procedures for establishing company-specific do-not-call lists to ensure effective compliance with and enforcement of the requirements for protecting consumer privacy.[46] See § 64.1200(e). Unlike the DMA list cited by CSC at n. 42, supra, the alternative we adopt today requires the compliance of all telemarketers engaged in telephone solicitation as defined in the TCPA. Thus, any person or entity engaged in telephone solicitation is required to maintain a list of residential telephone subscribers who request not to be called by the telemarketer.[47] The requirements will help ensure that residential subscriber privacy is protected from further undesired solicitations and will avoid the wide dissemination of

information regarding a subscriber's do-not-call request. Each person or entity making a telephone solicitation, or on whose behalf a telephone solicitation is made, will be held ultimately responsible for maintenance of its do-not-call list and will be fully accountable for any problems arising in the maintenance and accuracy of the list.[48] Telemarketers are required to maintain do-not-call lists on a permanent basis, so that consumers will not be burdened with periodic calls to renew a do-not-call request. Moreover, in the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.[49] Finally, § 227(C)(5) of the TCPA provides that a telemarketer's implementation, with due care, of reasonable practices and procedures in compliance with the requirements for protection of residential subscribers from unwanted telephone solicitations will be an affirmative defense to a cause of action brought regarding a violation of such requirements.[50]

25. Time of Day Restrictions. While many commenters support reasonable time of day restrictions on telemarketing calls,[51] several state that such restrictions are unnecessary because responsible telemarketers already restrict their calls to reasonable hours as a sound business practice.[52] The OPUC notes that many telemarketing complaints mention the late or unreasonable hour of the call. Several commenters urge the Commission not to adopt time of day restrictions

which would conflict with the requirements of the Fair Debt Collection Practices Act (FDCPA).[53]

26. We concur with commenters that responsible telemarketers are likely to restrict their calls to reasonable hours. However, both the record and the legislative history indicate that early morning and late night telephone solicitations are a significant nuisance to telephone subscribers. In light of the record and the legislative history, we conclude that it is in the public interest to impose time of day restrictions on telephone solicitations as reasonable limitations to invasions of residential subscriber privacy. We concur with the commenters that any conflict between the requirements of the TCPA and the FDCPA would make compliance with both statutes confusing. Accordingly, telemarketers will be subject to the same time of day restrictions as are imposed on debt collectors under the FDCPA. These regulations will coincide with the FDCPA prohibition against calls before the hour of 8 AM and after 9 PM, local time at the called party's location. We believe that time of day restrictions will protect consumers from objectionable calls while not unduly burdening legitimate telemarketing activity.

C. Autodialers and Artificial or Prerecorded Messages

1. General Prohibitions.

27. The TCPA prohibits the use of autodialers and prerecorded messages to place calls to an emergency telephone line, to health care facilities, to radio common carrier services, and to services for which the called party is charged for the call, except in emergencies or

with the prior express consent of the called party. It also prohibits prerecorded message calls (but not autodialed calls) to residences except in emergencies or with the prior express consent of the called party. The TCPA, however, permits the Commission to exempt from the residential prohibition calls which are non-commercial and commercial calls which do not adversely affect the privacy rights of the called party and which do not transmit an unsolicited advertisement. §§ 227(b)(2)(B). Accordingly, the NPRM proposed to exempt these calls from the residential prohibitions, as well as calls from parties with which the called party has an established business relationship and calls from tax-exempt nonprofit organizations.

28. Commenters generally support the prohibitions in the NPRM on the use of autodialers and prerecorded messages. Specifically, Centel Corporation (Centel) and Citicorp concur that the restrictions set forth in the NPRM properly balance consumer privacy concerns and legitimate telemarketing practices. Many commenters, however, request clarification regarding the scope of these prohibitions. As discussed below, we adopt the general prohibitions and the exemptions proposed in the NPRM, clarifying their scope as requested.

2. Prior Express Consent.

29. The TCPA allows autodialed and prerecorded message calls if the called party expressly consents to their use. Several commenters express concern that they would unintentionally incur liability by placing calls to individuals who provided a number at one of the

"prohibited destinations" (for example, a hospital or an emergency line) as the number at which that individual could be reached.[54] Commenters note that they have no way of knowing whether numbers provided to them fall in one of the categories of destinations to which calls are prohibited, or whether such numbers have been changed without notification.[55]

30. Many commenters express the view that any telephone subscriber that provides his or her telephone number to a business does so with the expectation that the party to whom the number was given will return the call. Hence, any telephone subscriber who releases his or her telephone number has, in effect, given prior express consent to be called by the entity to which the number was released.[56] Private Citizen urges the Commission to reject this interpretation and points out that some 800 numbers have the capacity to record the telephone number of an incoming call without the caller's knowledge or consent. It urges the Commission to clarify that telemarketers may not use the telephone numbers of persons who call to make inquiries without expressly requesting permission to use the number for that purpose.

31. We emphasize that under the prohibitions set forth in § 227(b)(1) and in §§ 64.1200(a)-(d) of our rules, only calls placed by automatic telephone dialing systems or using an artificial or prerecorded voice are prohibited. If a call is otherwise subject to the prohibitions of § 64.1200, persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.[57] Hence, telemarketers will not violate our rules by calling a

number which was provided as one at which the called party wishes to be reached. However, if a caller's number is "captured" by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls. Therefore, calls may be placed to "captured" numbers only if such calls fall under the existing exemptions to the restrictions on autodialer and prerecorded message calls.

3. Exemptions to Prohibited Uses of Artificial or Prerecorded Messages.

32. Established Business Relationship. The NPRM tentatively concluded that the privacy rights the TCPA intended to protect through the prohibition on prerecorded message calls to residences are not adversely affected where the called party has or had a voluntary business relationship with the caller. Most commenters support the proposed exemption in the NPRM for calls to persons with whom the caller has a prior or existing business relationship. CSC argues that the proposed exemption is overbroad because it extends beyond current or ongoing business relationships to prior business relationships. Further, CSC contends that the TCPA intended to exempt business relationship calls only from its restrictions on live operation solicitations and not from the autodialer prohibitions. CSC maintains that, at a minimum, the Commission should require actual consent to telephone solicitations and must clearly provide a means by which consumers may terminate any such relationship.

33. In addition, we sought comment on the proper scope

of this exemption and on the definition of the term "business relationship." However, comments regarding the proper definition and scope of this exemption vary widely. Many commenters concur that an existing business relationship could not be formed with a residential telephone subscriber solely on the basis of a prior solicitation.[58] Many commenters contend that the Commission should adhere to the broadest possible definition of the business relationship, rather than a narrow definition which may exclude many categories of appropriately exempted calls.[59] Other commenters suggest various factors for determining the existence of a business relationship, including an exchange of consideration; a transaction between the caller and the called party within some specified period prior to the telephone solicitation; a previous inquiry or an application made by the called party to the caller for products or services; time elapsed since last inquiry or transaction; and prior express consent by the called party to the caller for future calls.[60]

34. Although the TCPA does not explicitly exempt prerecorded message calls from a party with whom the consumer has an established business relationship, it provides an exemption for commercial calls which do not adversely affect residential subscriber privacy interests and do not include an unsolicited advertisement. We conclude, based upon the comments received and the legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship.[61] Additionally, the legislative history indicates that the TCPA does not intend to

unduly interfere with ongoing business relationships;[62] barring autodialer solicitations or requiring actual consent to prerecorded message calls where such relationships exist could significantly impede communications between businesses and their customers. Thus, we are not persuaded that the TCPA precludes the use of prerecorded messages to make solicitations to a party with whom the telemarketer has an established business relationship. In view of the support in the record for the exemption and the legislative history, we conclude that the TCPA permits an exemption for established business relationship calls from the restriction on artificial or prerecorded message calls to residences.[63] We decline to create more specific business relationship exemptions as requested by several commenters, such as utility companies, in favor of an exemption broad enough to encompass a wide range of business relationships. Finally, consistent with our conclusions at para. 24 supra, we find that a consumer's established business relationship with one company may also extend to the company's affiliates and subsidiaries.[64]

35. Many commenters concur with our tentative conclusion that a business relationship should be defined broadly rather than narrowly (e.g., an exchange of consideration), but that it cannot be formed solely on the basis of a prior solicitation.[65] Based on the record in this proceeding and the legislative intent to address a broad range of business relationships in the rules, we adopt our tentative conclusion.[66] Accordingly, the rules define "established business relationship" as a prior or existing relationship formed by a voluntary two-way communication between the caller and the called party, which relationship has not been previously terminated

by either party. The relationship may be formed with or without an exchange of consideration on the basis of an inquiry, application, purchase or transaction by the residential telephone subscriber regarding products or services offered by the telemarketer.[67] A broad definition of the business relationship can encompass a wide variety of business relationships (e.g. publishers with subscribers, credit agreements) without eliminating legitimate relationships not specifically mentioned in the record. Accordingly, we reject proposals to define a business relationship by reference to consideration or to a period of time because such narrow definitions may exclude legitimate categories of business relationships.

36. Debt Collection Calls. In the NPRM, we observed that all debt collection circumstances involve a prior or existing business relationship. In addition, we tentatively concluded that debt collection calls are exempt from the TCPA's prohibitions against prerecorded message calls because they are commercial calls which do not convey an unsolicited advertisement and do not adversely affect residential subscriber rights.

37. Commenters generally support an exemption for debt collection calls.[68] Commenters concur that debt collection calls are exempt as calls to parties with whom the caller has a prior or existing business relationship, and further argue that debtors have given prior express consent to such calls by incurring a debt.[69] AFSA requests the Commission to explicitly exempt calls where terms of a credit agreement are not met. Moreover, AFSA argues that debt collection calls should be exempted as commercial calls not

transmitting an unsolicited advertisement and not adversely affecting privacy rights. A number of commenters urge the Commission to include language clarifying that calls made on behalf of a creditor or other entity attempting to collect a debt are exempted. CSC opposes a debt collection exemption, arguing that such an exemption would increase the potential for harassment. Other commenters maintain that prerecorded message calls are the least intrusive means of debt collection, and that elimination of this option could lead to higher transaction and loan servicing costs.[n70]

38. Many commenters request clarification of the identification requirements for artificial or prerecorded voice messages because these requirements appear to conflict with the requirements of the FDCPA. The FDCPA prohibits debt collection agents from revealing the identity of the creditor or the purpose of the call to third parties, and that a debt collector determine that the called party is the debtor before revealing the purpose of the call.[71] If the call is delivered using an artificial or prerecorded voice message, the message must be fashioned so that the purpose of the call is not revealed to a third party. The TCPA, on the other hand, requires prerecorded messages to identify the individual, business, or other entity placing the call at the beginning of the message. Some commenters urge the Commission to provide specific language for use in prerecorded messages. Other commenters simply urge the Commission not to adopt requirements which would conflict with the requirements of the FDCPA. The ABA suggests that the Commission adopt language to the effect that no requirements under § 227(d)(3) of the TCPA be deemed to preempt the requirement of other

federal or state laws.

39. Upon consideration of these comments, we conclude that an express exemption from the TCPA's prohibitions for debt collection calls is unnecessary because such calls are adequately covered by exemptions we are adopting here for commercial calls which do not transmit an unsolicited advertisement and for established business relationships. As proposed in the NPRM, these exemptions would also apply where a third party places a debt collection call on behalf of the company holding the debt. Whether the call is placed by or on behalf of the creditor, prerecorded debt collection calls would be exempt from the prohibitions on such calls to residences as: (1) calls from a party with whom the consumer has an established business relationship, and (2) commercial calls which do not adversely affect privacy rights and which do not transmit an unsolicited advertisement.[72] With respect to concerns regarding compliance with both the FDCPA and our rules in prerecorded message calls, we emphasize that the identification requirements will not apply to debt collection calls because such calls are not autodialer calls (i.e., dialed using a random or sequential number generator) and hence are not subject to the identification requirements for prerecorded messages in 64.1200(e)(4) of our rules.[73] Accordingly, we reject as unnecessary proposals that we provide specific language for use in prerecorded debt collection messages. In any event, to the extent any conflicts exist, compliance with both statutes is possible through the use of live calls.

40. Tax-Exempt Nonprofit Organizations and Non-Commercial Calls. In the NPRM, we sought comment

on whether tax-exempt nonprofit organizations should be exempt from the TCPA's prohibitions on prerecorded message calls to residences either because such calls are not made for commercial purposes, or because they are commercial calls which do not adversely affect privacy interests and which do not transmit an unsolicited advertisement. See § 64.1200(a)(2). We observed that the TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing activities. Commenters generally support the proposed exemption. However, a number of commenters object to such exemptions for calls from nonprofit organizations, arguing that such calls are also a nuisance and an invasion of privacy.[74] The legislative history of the TCPA contrasts calls made by tax-exempt nonprofit organizations with commercial calls and indicates that commercial calls have by far produced the greatest number of complaints about unwanted calls.[75] Moreover, no evidence has been presented in this proceeding to show that non-commercial calls represent as serious a concern for telephone subscribers as unsolicited commercial calls. Accordingly, based on the comments and the legislative history of TCPA, we conclude that tax-exempt nonprofit organizations should be exempt from the prohibition on prerecorded message calls to residences as non-commercial calls. Therefore, we will not seek additional authority to curb calls by tax-exempt nonprofit organizations.

41. Some commenters urge the Commission to expressly exempt specific categories of additional organizations such as market research or polling organizations, whose activities are not invasive of residential privacy rights and were not intended to be

prohibited by the TCPA.[76] We find that the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, political polling or similar activities which do not involve solicitation as defined by our rules.[77] We thus reject as unnecessary the proposal to create specific exemptions for such activities.

4. Clarifications.

42. Elderly Home. The TCPA prohibits autodialer and prerecorded message calls to "elderly homes" absent prior express consent or unless it is an emergency call. AFSA requests clarification of the term, as it appears in § 227(b)(1)(A)(ii) and in the proposed rules, § 64.1200(a)(1)(ii), noting that the term is sufficiently ambiguous to include the private homes of elderly telephone subscribers as well as health care establishments. Since the TCPA does not define the term, we must apply the plain meaning of the words in interpreting the statute. This term clearly refers to a residential setting for the elderly, but also suggests the vernacular for institutions like nursing homes and other long term health care facilities. Its placement in a section which refers to other health care facilities rather than in the following section regarding calls to residential telephone subscribers also suggests that the words are meant to describe an institutional setting in which the elderly reside, as opposed to any reference to the private homes of the elderly. Given the placement of this term in the statute and the lack of evidence in the legislative history suggesting any contrary meaning, we conclude that the words "elderly home" do not refer to the private homes of the elderly, and that

the words are intended to include in the general prohibition against autodialer and artificial or prerecorded voice messages calls made to health care facilities and those institutions which house primarily elderly persons.

43. Radio Common Carriers. The TCPA prohibits autodialer and prerecorded message calls to radio common carrier services or any service for which the called party is charged for the call. § 227(b)(1)(iii). The Cellular Telecommunications Industry Association (CTIA) and Centel Corporation urge the Commission to exempt from the prohibitions on autodialers and prerecorded messages those calls made by cellular carriers to cellular subscribers (as part of the subscriber's service) for which the called party is not charged. These commenters point out that cellular customers are not charged for calls which, for example, monitor service or issue warnings to "roamers" that they are moving out of the carrier's service area. Therefore, such calls should either be exempted from the prohibitions of § 64.1200(a)(1)(iii), or should be interpreted as not intended to be prohibited by Congress.

44. In addition, West Marketing Services (West), a market research firm, states that it licenses a program, CelShare, which places calls to cellular phones to measure a cellular carrier's share of a given cellular market. The CelShare program monitors cellular telephone company messages to determine whether a random sample of telephone numbers is active or inactive. To avoid actually reaching a cellular customer, calling devices are normally used in the middle of the night, are set to two rings, and immediately disconnect

if a cellular customer answers the call. West states that three live connections are made for every 1,000 calls. Since the primary function of its program is market research, and since no telemarketing is involved, West urges the Commission to allow its program to operate under the proposed rules. West notes that several states have specifically exempted its program from the definition of prohibited autodialer calls.

45. Based on the plain language of § 227(b)(1)(iii), we conclude that the TCPA did not intend to prohibit autodialer or prerecorded message calls to cellular customers for which the called party is not charged. Moreover, neither TCPA nor the legislative history indicates that Congress intended to impede communications between radio common carriers and their customers regarding the delivery of customer services by barring calls to cellular subscribers for which the subscriber is not called. Accordingly, cellular carriers need not obtain additional consent from their cellular subscribers prior to initiating autodialer and artificial and prerecorded message calls for which the cellular subscriber is not charged. However, the market research calls to cellular carriers, as conducted by the West CelShare program, are clearly prohibited absent the prior express consent of the cellular customer called. While West appears to take pains to avoid calls which will result in charges to cellular subscribers, the fact that its market research calls result in such charges and are made without prior consent from the subscribers places its service under the prohibitions of the TCPA and the rues.[78]

46. Voice Messaging Services. Several commenters request clarification that services which store and

forward messages for later delivery to the called party are not intended to be prohibited by the TCPA or by the proposed rules.[79] In urging the Commission to create a specific exemption for such services, the commenters point to numerous statements in the legislative history in which members of Congress expressed an expectation that such services would be exempted from the prohibitions of the TCPA.[80] Bell Atlantic asserts that the intent of Congress was to restrict unsolicited advertising, not communications services which store and transmit individual customer messages. MessagePhone concurs and references the Modified Final Judgment,[81] which, inter alia, permits the regional Bell Operating Companies to engage in such services, and lends support for such an exemption. Commenters contend that the Commission has already found such services to be in the public interest, citing a recent Commission decision granting a waiver to permit the delivery of Coin Message Delivery Services,[82] which has been recently deployed by Bell Atlantic. Ameritech urges the Commission to clarify whether the prerecorded message identification requirement applies to the local operating company or the person leaving the message, or both, for messages recorded using services like the Public Telephone Message Delivery Service (PIMDS). Ameritech contends that if the person leaving the message identifies himself or herself, then further identifying information (such as a telephone number or address) is unnecessary.

47. The TCPA did not carve out a specific exemption for voice messaging services. However, the services referred to by the commenters would appear to fall either outside the TCPA's prohibitions or under an

exemption. The prohibitions of § 227(b)(1) clearly do not apply to functions like "speed dialing," "call forwarding," or public telephone delayed message services (PTDMS), because the numbers called are not generated in a random or sequential fashion.[83] Voice messaging services used to send personal prerecorded voice messages are not subject to the identification requirements of 227(d)(3) and § 64.1200(d) of our rules because such calls do not use autodialers to transmit prerecorded messages. Moreover, under the rules adopted here, artificial and prerecorded message calls to residences are exempt from the TCPA's prohibitions in an emergency, where the caller received prior express consent, or if the call is exempted by the Commission as either a non-commercial call or a commercial call which does not include an unsolicited advertisement and does not adversely affect the called party's privacy interests. Thus, Automated Alternate Billing Systems (AABS), used by common carriers to perform operator services with artificial or prerecorded voice prompts, are exempt from the prohibition against artificial or prerecorded voice calls to residences to the extent they are non-commercial calls. However, voice message calls, as prerecorded messages, would be subject to the prohibitions of § 227(b)(1) and § 64.1200(a) of our rules. Thus, voice message calls could not be directed to an emergency line, a health care facility, radio common carrier services or other services for which the called party is charged for the call except in an emergency or with the prior express consent of the called party.

48. In light of the foregoing, we believe that the prohibitions set forth in the rules are not a barrier to the continued use and expansion of voice messaging

service, and that the rules adopted here will be effective in preventing any potential abuse by telemarketers. See §§ 64.1200(a)-(d). Accordingly, a specific voice messaging exemption is not necessary to permit the present and future voice messaging services.

49. Public Utilities. Many public utilities note that they communicate with their customers through prerecorded message calls and automatic telephone dialing systems to notify customers of service outages, to warn customers of discontinuance of service, and to read meters for billing purposes. They note that under normal circumstances, customers can continue using their telephones normally as the meter information is being gathered and forwarded to a central office. The utilities urge the Commission to exempt such calls from the autodialer prohibitions, either under the existing business relationship exemption or under the "emergency" exemption for calls related to public health and safety because information about service outages and about possible discontinuance of service affect public health and safety. Moreover, many public utilities state that they have a third party notification service for their customers, in which the utility agrees to contact a party designated by the customer in the event that a delinquent bill or a service outage threatens interruption of that customer's service. This program is designed to assist persons who have difficulty maintaining their accounts or who otherwise desire assistance in ensuring that service is not interrupted. However, several commenters express concern that a broad emergency exception could be a vehicle for campaigns targeted at the elderly, who in the past have been subjected to telemarketing calls involving vitamins, security systems, or other items

purported to be important to the "health and safety" of the called party.

50. BellSouth concurs with the public utilities and contends that the legislative history[84] indicates an intent to permit autodialed calls for the purpose of notifying customers of potential power outages, maintenance, or termination. In some jurisdictions, BellSouth is required by tariff to notify customers before disconnecting service. BellSouth requests the Commission to exempt from the prohibitions of § 64.1200(a)(1) autodialed calls regarding the installation, maintenance, or termination of telephone service in emergency situations. Further, Ameritech contends that the use of Automatic Meter Reading Systems by utility companies clearly satisfies the TCPA's requirements regarding prior express consent, and that such services were not intended by Congress to be prohibited.

51. Each of the circumstances described by the utilities is included within either the broad exemption for emergency calls, or the exemption for calls to which the called party has given prior express consent. Service outages and interruptions in the supply of water, gas or electricity could in many instances pose significant risks to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public. Similarly, public utilities providing a third party notification service do not violate the prohibition against prerecorded calls to residences where the third party has given his or her prior express consent to the notification or the call relates to a public health and

safety matter. In light of the comprehensive nature of the current exemptions, a specific exemption for public utilities to the general prohibition against autodialers and artificial or prerecorded voice message calls is not required.[85]

D. Technical and Procedural Standards

1. Line Seizure - 5 Second Hang-up Requirement.

52. The TCPA requires, and the rules we adopt provide, that automatic telephone dialing systems used to transmit artificial or prerecorded messages shall automatically release the called party's line within 5 seconds of the time that the calling party's system is notified of the called party's hang-up. The ACA requests clarification of this requirement in order to ensure proper compliance. For the purposes of this rule section, the 5 second period begins when the called party's hang-up signal reaches the dialing system of the caller. Commenters generally do not indicate that they anticipate problems in complying with this requirement.[86]

2. Identification Requirements for Artificial or Prerecorded Voice Systems.

53. The TCPA mandates that all artificial or prerecorded telephone messages delivered by an autodialer state clearly the identity of the caller at the beginning of the message and the caller's telephone number or address during or after the message, § 227(d)(3)(A), and we adopt this requirement in our rules, 64.1200(d). A number of commenters request that prerecorded messages be required to state the identity

of the caller and the caller's telephone number (other than that of any autodialing system used to place the call) or address within 30 seconds after the message begins, so that the called party would not have to listen to the entire message before deciding whether to hang up. We reject the proposal to require that a telephone number or address be stated within 30 seconds of the beginning of an artificial or prerecorded message, because the TCPA requires only that the caller's identity be stated at the beginning of the message. See § 227(d)(3)(B). We have been presented with no evidence to persuade us to request additional authority to adopt such a restriction. Finally, as suggested by several commenters, we will require callers leaving a telephone number to provide a number other than that of the autodialer or prerecorded message player which placed the call because the autodialer or message player number may be in constant use and not available to receive calls from the called party. § 64.1200(e)(4).

3. Facsimile Machines.

54. The TCPA requires that identifying information be placed on all telephone facsimile transmissions, and that telephone facsimile machines be capable of placing such information on all transmissions. § 227(d). The TCPA further prohibits the use of telephone facsimile machines to send unsolicited advertisements.[87] § 227(b)(1)(C). Parties commenting on the facsimile requirements for senders of facsimile messages urge the Commission to clarify that carriers who simply provide transmission facilities that are used to transmit others' unsolicited facsimile advertisements may not be held liable for any violations of § 64.1200(a)(3).[88] We concur with these commenters. In the absence of "a

high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions," common carriers will not be held liable for the transmission of a prohibited facsimile message. Use of Common Carriers, 2 FCC Rcd 2819, 2820 (1987).

n87 Mr. Fax and National Faxlist urged the Commission not to impose a ban on unsolicited telephone facsimile advertisements; National Faxlist suggested that a telephone facsimile do-not-call list be created in lieu of a complete prohibition on such unsolicited advertisements. GTE requested clarification that the identification requirement does not apply to each page of messages transmitted through imaging systems.

In banning telephone facsimile advertisements, the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition (see § 227(b)(1)(C); thus, such transmissions are banned in our rules as they are in the TCPA. § 64.1200(a)(3). We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. See para. 34, supra. Furthermore, the term "telephone facsimile machine" as defined in the TCPA and identically in our rules, § 64.1200(f) clearly includes imaging systems. The rules state that the first page or each page of a transmission to a facsimile machine must include identifying information.

E. Enforcement

1. Private Right of Action.

55. The TCPA provides consumers with a private right of action, if otherwise permitted by state law or court rules, for any violation of the autodialer or prerecorded voice message prohibitions and for any violation of the guidelines for telephone solicitations. § 227(c)(5). Absent state law to the contrary, consumers may immediately file suit in state court if a caller violates the TCPA's prohibitions on the use of automatic telephone dialing system and artificial or prerecorded voice messages. § 227(b)(3). A consumer may also file suit in state court if he or she has received more than one telephone call within any 12-month period by or on behalf of the same company in violation of the guidelines for making telephone solicitations. § 227(c)(5). Telemarketers who have established and implemented reasonable practices and procedures in compliance with the latter section may present such compliance as an affirmative defense to any action for violation of telephone solicitation guidelines. § 227(c)(5). The TCPA also permits states to initiate a civil action in federal district court against a telemarketer who engages in a pattern or practice of violations of the TCPA. §§ 227(f)(1) and (2). States retain the power to initiate action in state court for violations of state telemarketing statutes. § 227(f)(6). Finally, consumers may request that the Commission take enforcement action regarding violations of § 227, consistent with the Commission's existing complaint procedures.[89]

2. State Law Preemption.

56. The TCPA, in § 227(e), sets forth a standard for preemption of state law on autodialing, artificial or prerecorded voice messages, and telephone solicitations. The TCPA does not preempt state law

which imposes more restrictive intrastate requirements or regulations regarding: the use of facsimile machines to send unsolicited advertisements; the use of automatic telephone dialing systems; the use of artificial or prerecorded voice messages; or the making of telephone solicitations. However, the TCPA specifically preempts state law where it conflicts with the technical and procedural requirements for identification of senders of telephone facsimile messages or autodialed artificial or prerecorded voice messages. § 227(e).

3. Other Matters

57. A number of commenters urge the Commission to request additional authority from Congress to protect consumer privacy interests, arguing that the NPRM errs on the side of protecting commercial speech and does not adequately protect telephone subscribers from invasions of privacy by telemarketers. These commenters point out that telephone subscribers must receive at least one unwanted solicitation before making a claim under the rules. The National Consumers League urges the Commission to withdraw the NPRM and begin the rulemaking process anew, stating that the Commission failed to make specific proposals for meeting the requirements of the TCPA.

58. Based upon our actions here, we find that no further authority is required at the present time to accomplish the goals of the TCPA to restrict unwanted telephone solicitations. The regulations implemented satisfy the TCPA's requirements that residential subscribers be provided with a means to avoid unwanted telephone solicitations, and that autodialers and prerecorded or

artificial voice messages be used responsibly in ways that do not impede commerce or threaten public health and safety. The record supports our conclusion that the proposed rules strike a reasonable balance between privacy rights, public safety interests, and commercial freedoms of speech and trade, which Congress cited as its paramount concerns in enacting the TCPA.[90] Moreover, contrary to the allegation of the National Consumers League, the NPRM asked for comment on a variety of proposals for restricting telephone solicitations to residences and weighed their benefits, as directed by § 227(c) of the TCPA. Specific information on the various proposals was supplied in the comments and our decision is based upon the record. Accordingly, we find at this time that renewal of the rulemaking process is not warranted and would unduly delay implementation of consumer privacy protections.

59. However, we are concerned that consumers be fully informed of their rights under the TCPA. In addition to disseminating our own public notices, we will work with consumer groups, industry associations, local telephone companies, and state agencies to assure that the rules we adopt today are well publicized. We also will monitor closely any reports of alleged violations of the TCPA or the rules that are filed with the Commission to determine whether additional action is necessary to protect consumers from unwanted solicitations. If our current approach is not successful, a number of options are available. For example, we could convene a cross-industry board or advisory council to evaluate the complaints received and recommend effective solutions. Both Congress and the Commission have found telemarketing serves a valuable role in our economy,

and it is appropriate for responsible telemarketers, who benefit from the activity, to devise solutions to problems. Alternatively, based upon our experience with the rules, it may be necessary to initiate a rulemaking proceeding to establish more stringent restrictions, or even to recommend to Congress that it increase penalties or make other statutory changes. Our objective in this proceeding has been to hold telemarketers accountable for their activities without undermining the legitimate business efforts of telemarketing. Existing Commission procedures will permit us to continue to do so.

IV. CONCLUSION

60. This rulemaking proceeding seeks to protect consumers from automated calls which may pose a threat to health and safety as well as from unwanted solicitations. Section § 64.1200(a) prohibits calls using autodialers or prerecorded messages to emergency lines, health care facilities, and calls to radio common carriers or other numbers for which the called party may be charged for the call. Prerecorded message calls to residences are generally prohibited. We have created specific exemptions to this prohibition where the record demonstrates that the calls do not adversely affect the privacy interests of residential subscribers: non-commercial calls, commercial calls not transmitting an unsolicited advertisement, calls from parties with whom a resident has an established business relationship, and calls from tax-exempt nonprofit organizations. Finally, residential subscribers will be protected from unwanted telephone solicitations by the requirement that telemarketers maintain do-not-call lists for any telephone solicitations.

V. PROCEDURAL MATTERS

61. Final Regulatory Analysis: Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 601, et seq., the Commission's final analysis in this Report and Order is as follows:

I. Need and purpose of this action:

This Report and Order amends Part 64 of the Commission's rules by adding § 64.1200 to restrict the use of automatic telephone dialing systems and artificial or prerecorded voice messages for telemarketing purposes or for transmitting unsolicited telephone facsimile advertisements. The rules require that persons or entities making telephone solicitations establish procedures to protect residential subscribers from unwanted solicitations, and set forth exemptions to certain prohibitions under this Part. The Report and Order also amends Part 68 of the rules by revising § 68.318(c)(2) and adding § 68.318(c)(3) to require that automatic telephone dialing systems delivering a recorded message release the called party's line within 5 seconds of notification of hang-up by the called party, and to require that telephone facsimile machines manufactured on and after December 20, 1992 must clearly identify the sender of a facsimile message. The amendments implement the Telephone Consumer Protection Act of 1991, which, inter alia, adds Section 227 to the Communications Act of 1934, as amended, 47 U.S.C. Section 227. The rules are intended to impose reasonable restrictions on autodialed or prerecorded voice telephone calls consistent with considerations regarding public health and safety and commercial speech and trade, and to allow consumers to avoid

unwanted telephone solicitations without unduly limiting legitimate telemarketing practices.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No comments were submitted in direct response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

The NPRM in this proceeding requested comments on proposed regulations implementing the TCPA and comments on several proposals restricting telephone solicitations to residential telephone subscribers. The Commission has considered all comments and has adopted regulations to implement the prohibitions and technical requirements mandated by the TCPA as well as regulations which allow consumers to avoid unwanted telephone solicitations through placement on company-specific do-not-call lists. The Commission considers its Report and Order to be the most reasonable course of action under the mandate of Section 227 of the Communications Act, as amended.

VI. ORDERING CLAUSES

62. Accordingly, It Is Ordered, that, pursuant to authority contained in Sections 1, 4(i), 4(j), 201-205, 218, and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218 and 227, Parts 64 and 68 of the Commission's Rules and Regulations ARE AMENDED as set forth in Appendix B hereof, effective December 20, 1992.

63. It Is Further Ordered, that, the Secretary shall cause a summary of this Report and Order to be published in the Federal Register which shall include a statement describing how members of the public may obtain the complete text of this Commission decision. The Secretary shall also provide a copy of this Report and Order to each state utility commission.

64. It Is Further Ordered, that, this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Secretary

Footnotes

n1 The President signed the bill into law because it gives the Commission "ample authority to preserve legitimate business practices." Statement by the President upon signing the TCPA into law, December 20, 1991.

n2 See Notice of Proposed Rulemaking in CC Docket No. 92-90, 7 FCC Rcd 2736 (1992). The Commission designates Subpart L of Part 64 of its rules as the appropriate location for most of the rules implementing the TCPA. Additional rules implementing the TCPA which address certain requirements for terminal equipment are located in Part 68 of the Commission's rules. The full text of the TCPA is included as an appendix to the NPRM. The rules adopted in this order appear in Appendix B.

n3 In addition to comments filed by the parties listed in Appendix A, we received numerous letters and other informal comments in response to the NPRM. We have considered each of these additional comments in adopting this Report and Order.

n4 In this order, the term "telemarketer" refers to any person or entity making a telephone solicitation (regardless of the precise means used to place or complete such a call).

n5 See Appendix B.

n6 All terms except "established business relationship" are defined in the TCPA (see § 227(a)); we have incorporated those statutory definitions in our rules.

n7 47 U.S.C. § 227(c). The TCPA also requires the Commission to consider whether specific regulations should be adopted regulating artificial or prerecorded voice calls to businesses. § 227(b)(2)(A). Concerns regarding telemarketer intrusions upon commerce are largely addressed in the rules, which prohibit autodialed and artificial or prerecorded message calls where the called party would incur costs for such calls, such calls would likely affect public health and safety, or where such calls would tie up two or more lines of a business simultaneously. See 47 C.F.R. §§ 64.1200 (a)(1), (a)(4), and (b). Commenters express concern that prerecorded message calls will affect public health and safety and impede commerce. Most commenters, however, do not raise privacy concerns with respect to prerecorded calls to businesses. Based on the record and on the scope of the prohibitions on autodialers and prerecorded messages in the rules we adopt today, we

are not persuaded that additional prohibitions on prerecorded voice message calls to businesses are necessary at this time.

n8 See, e.g., comments of American Telephone and Telegraph (AT&T).

n9 See, e.g., comments of Center for the Study of Commercialism (CSC) and National Consumers League (NCL). Commenters point to statements in reports on earlier versions of the TCPA noting that technology which permits a greater volume of solicitations with less personnel has led to an increasing number of consumer complaints and has prompted at least 40 states to enact restrictions on the use of autodialers, prerecorded message players, and unwanted solicitations. As examples of the source of consumer complaints, the reports note that callers making solicitations often fail to identify themselves, and that autodialers and prerecorded messages do not release a line after hangup. See Senate Report 102-177, 102d Cong., 1st Sess. (1991), p. 2; Senate Report 102-178 102d Cong, 1st Sess. (1991), pp. 2-3.

n10 Lejeune Associates of Florida (Lejeune) notes that Florida receives 300-500 complaints per month under its telephone solicitation statute. The Ohio Public Utilities Commission (OPUC) receives an average of 100 telephone solicitation complaints per month. The Direct Marketing Association (DMA) notes that 400,000 consumers have asked to be included in its Telephone Preference Service, which functions as a do-not-call list for the telemarketing industry.

n11 See Senate Report 102-177, 1st Sess., pp. 1-3 (1991);

House Report 102-317, 1st Sess., pp. 8-10.

n12 Autodialer and prerecorded message calls are subject to a stricter standard, as discussed in paras. 27-51, infra.

n13 See, e.g., comments of AT&T.

n14 See, e.g., comments of Securities Industry Association (SIA).

n15 See, e.g., comments of National Retail Federation (NRF).

n16 See, e.g., comments of Pacific Bell, Nevada Bell (Pacific Bell).

n17 See, e.g., comments of SafeCard Services, Inc. (Safecard); and Sprint.

n18 See, e.g., comments of AT&T.

n19 See, e.g., comments of Sprint.

n20 See, e.g., comments of DMA.

n21 See, e.g., comments of Consumer Bankers Association (CBA).

n22 See, e.g., comments of J. C. Penney. Southwestern Bell Telephone (SWBT) notes that laws in each of the states it serves prohibit SWBT from breaching the confidentiality of subscribers having unpublished or unlisted numbers.

n23 We note that the TCPA prohibits any alternative which calls for any charge for participation to residential subscribers. § 227(c)(2). The Florida database, for example, charges subscribers for their participation in the database. Nynex Telephone Companies (Nynex) states that although New England Telephone has spent more that $ 1 million to implement a statewide do-not-call database in Massachusetts, only nine telemarketers have purchased the $ 300 do-not-call list. Nynex further notes that Massachusetts allows New England Telephone to recover costs of its state do-not-call database from the subscriber rate base.

n24 Commenters largely support the Commission's tentative conclusion in the NPRM that a national database should neither receive federal funds nor a federal contract for its establishment, operation, or maintenance. NCL objects to the finding, arguing that the failure of self-regulation, along with the TCPA, require strict federal regulatory oversight of telemarketing practices. In light of the action taken in the TCPA and in our rules to restrict the most abusive telemarketing practices, and in the absence of more persuasive evidence to support federal expenditures to further restrict such practices, we find that it is not in the public interest to pass on to taxpayers the costs of a national database system.

n25 See, e.g., comments of Citicorp, Sprint.

n26 See, e.g., comments of AMEX and Olan Mills. Moreover, based upon the comments, we are not persuaded that the current state of technology would permit the rapid and cost-efficient utilization of LIDB to function as a national do-not-call database. See, e.g.,

comments of ITN, Pacific Bell, Southern New England Telephone (SNET), SWBT, and Sprint.

n27 See, e.g., comments of AT&T, Lejeune Associates, and Sprint.

n28 See, e.g., comments of SNET, Sprint.

n29 See, e.g., comments of SIA.

n30 See, e.g., comments of Bell Atlantic; BellSouth; Pacific Bell; and SNET.

n31 See, e.g., comments of CSC, GTE.

n32 See, e.g., comments of J. C. Penny, North American Telecommunications Association (NATA) and SafeCard. Nynex states that inserting an asterisk to mark do-not-call preferences in its directories would cost its publishing division $ 100,000, in addition to $ 300,000 for an additional 400 tons of paper and $ 125,000 in printing costs. Nynex's experiment in using an asterisk to mark customer preferences received complaints that marks confused readers. BellSouth provided special directory markings in its state of Florida directory from October 1, 1987 to October 1, 1990. In its comments, BellSouth states that the service proved to be largely ineffective in reducing unwanted solicitations and was withdrawn. See comments of BellSouth at 9, n. 13.

n33 See, e.g., comments of BellSouth and Consumer Action.

n34 See, e.g., comments of National Telephone

Cooperative Association (NTCA) and Pacific Bell.

n35 See, e.g., comments of Citicorp; Olan Mills; Sprint; and SWBT.

n36 See, e.g., comments of CUC International, Olan Mills, Pacific Bell.

n37 See, e.g., comments of Ameritech Operating Companies (Ameritech) and Cox Enterprises, Inc. (Cox).

n38 See, e.g., comments of American Telemarketing Association (ATA), Citicorp.

n39 See, e.g., comments of Citicorp; DMA; reply comments of AMEX and Ameritech.

n40 See, e.g., comments of AMEX, Citicorp.

n41 See, e.g., comments of Ameritech, Citicorp.

n42 CSC cites House Report 102-317 at 19-20, finding the existing DMA list to be unsatisfactory because it is "not comprehensive in nature." See also comments of Consumer Action, Lejeune, and U.S. West

n43 "With respect to both company-specific and industry-wide databases, the Commission should consider whether making such practices mandatory, and imposing substantial sanctions for violations would increase their effectiveness to the point that they could satisfy the statutory requirements of this Act." House Report 102-317, 102d Cong., 1st Sess. (1991) at 20.

n44 Several commenters oppose the implementation of mandatory industry-based lists, arguing that this alternative raises the same problems of cost, confidentiality, and obsolescence as a national database. See, e.g., comments of Bell Atlantic and CUC International. Industry-based do-not-call lists may be appropriate for smaller telemarketers who find it more economical or efficient to maintain do-not-call lists in cooperation with other telemarketers in the same region or industry. See, e.g., comments of Time Warner, Inc. (TWI). Therefore, our decision to choose the company-specific do-not-call list alternative does not preclude telemarketers from voluntarily maintaining an industry-based do-not-call list as long as that method comports with the rules set forth in § 64.1200(e) for maintaining do-not-call lists. We emphasize that, regardless of the method chosen, the person or entity making a telephone solicitation, or on whose behalf a telephone solicitation is made, will ultimately be held responsible for compliance with our rules. See para. 24, infra.

n45 We emphasize that § 227(c)(2) prohibits the imposition of any charge on residential subscribers from procedures to protect them from unwanted solicitations.

n46 See, e.g., comments of DMA.

n47 Tax-exempt nonprofit organizations are not subject to this requirement because the TCPA excludes such organizations from the definition of "telephone solicitation." See § 227(a)(3). Therefore, tax-exempt nonprofit organizations need not maintain do-not-call lists.

The definition of "telephone solicitation" in § 227(a)(3) also excludes calls made to parties with whom the caller has an established business relationship and calls for which the calling party has received the called party's prior express invitation or permission. We emphasize, however, that subscribers may sever any business relationship, i.e., revoke consent to any future solicitations, by requesting that they not receive further calls from a telemarketer, thus subjecting that telemarketer to the requirements of § 64.1200(e).

n48 See n. 44, supra. The TCPA enforcement mechanisms are discussed in paras. 55-56, infra.

n49 See House Report 102-317, 102d Cong., 1st Sess., pp. 13-17 (1991).

n50 The Newspaper Association of America suggests that alternative methods and procedures should be permitted for second class mail permit holders if the national database alternative is mandated, but states that separate treatment would not be necessary under the company-specific do-not-call list option. In light of our selection of the company-specific do-not-call list as the preferred alternative for limiting unwanted telephone solicitations, we do not believe that separate methods and procedures are required for small businesses, independent contractors, or holders of second class mail permits. We conclude that the benefits of company-specific do-not-call lists are the same, e.g. cost, efficiency, and effectiveness, for small entities and for holders of second class mail permits as they are for larger enterprises, and therefore these entities will be subject to the same requirements under our rules.

n51 See, e.g., comments of Ameritech; CBA; and NATA.

n52 See, e.g., comments of Bell Atlantic.

n53 See, e.g., comments of American Collectors Association (ACA). The FDCPA prohibits calls before the hour of 8 AM and after 9 PM, local time at the called party's location. 15 U.S.C. § 1692c(1). See also paras. 36-39 infra.

n54 See, e.g., comments of American Bankers Association (ABA).

n55 See, e.g., comments of BellSouth.

n56 See, e.g., comments of Citicorp and J. C. Penney.

n57 See House Report, 102-317, 1st Sess., 102nd Cong. (1991), at p. 13, which supports this interpretation, noting that in such instances "the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications."

n58 See, e.g., comments of OPUC.

n59 See, e.g., comments of ACA and AMEX.

n60 See, e.g., comments of ABA and ACA.

n61 See, e.g., comments of InterVoice.

n62 See House Report, 102-317, 102d Cong., 1st Session (1991), p. 13.

n63 We emphasize, however, that a business may not make telephone solicitations to an existing or former customer who has asked to be placed on that company's do-not-call list. A customer's request to be placed on the company's do-not-call list terminates the business relationship between the company and that customer for the purpose of any future solicitation. See n. 47, supra.

n64 See House Report, 102-317, 102d Cong., 1st Session (1991), pp. 13-17, noting that solicitations by persons or entities affiliated with businesses which have an established business relationship with the consumer would be permissible in certain circumstances, but that companies should honor requests not to call again notwithstanding any business relationship with the consumer.

n65 See, e.g., comments of AMEX, TWI.

n66 See, e.g., House Report 102-317, 102d Cong., 1st Session (1991), pp. 13-17.

n67 As we noted in para. 31, supra, a party making an inquiry cannot be considered to have given prior express consent to future autodialed or prerecorded message calls simply because that party's number has been "captured" by an ANI device or similar system. Nor can a consumer inquiry be considered to create a business relationship where the consumer's number has been captured absent that consumer's express invitation or permission to be contacted at the captured number.

n68 See comments of ABA; American Financial

Services Association (AFSA); the Coalition; Citicorp; CBA; Gannett; Household International; National Retail Federation; Teknekron; and Wells Fargo.

n69 See comments of ACA; AFSA; Ameritech; Citicorp; CBA; Household International; Ohio Student Loan Commission; and Wells Fargo.

n70 See comments of the Coalition; CBA; Digital Systems International; and the National Retail Federation.

n71 Debt collectors subject to the FDCPA are prohibited from conveying any information to third parties, even inadvertently, with respect to the existence of a debt. 15 U.S.C. § 1629b-c. The FDCPA requires a collector initiating a call answered by a third party to identify himself by name but not to disclose the name of his employer unless asked. 15 U.S.C. § 1629b(1). See comments of ACA.

n72 A creditor may solicit a residential subscriber using a prerecorded message as long the established business relationship has not been previously severed by the debtor. This interpretation reflects the legislative intent expressed in House Report, 102-317, 102d Cong., 1st Session (1991), pp. 14-17.

n73 See comments of ABA, ACA. See also paras. 25-26 supra

n74 See, e.g., comments of NCL and OPUC.

n75 See, House Report 102-317 at 16-17 stating that "most unwanted telephone solicitations are commercial

in nature" and that "the two main sources of consumer problems -- high volume of solicitations and unexpected solicitations -- are not present in solicitations by nonprofit organizations." See also, Senate Report 102-177 at 6, to accompany Bill S. 1410. 102d Cong., (1991).

n76 See comments of Congressman Brewster and Public Forum.

n77 See para. 45, infra., emphasizing that market research or surveys would be prohibited under § 227 of the TCPA and § 64.1200(a)(1) if the called party were charged for the call without the party's prior express consent or if such calls contain unsolicited advertisements.

n78 A few commenters note that the NPRM omitted from the proposed rules the phrase "or other radio common carrier service," as it appears in § 227(b)(1)(A)(iii) of the TCPA. This language was indeed inadvertently omitted from the text of the proposed rule, and has been included in § 64.1200(a)(1)(iii) to mirror the language of the TCPA. See Appendix B.

n79 See comments of Ameritech and MessagePhone.

n80 See comments of Ameritech and reply comments of Ameritech at 4, n.9.

n81 See United States v. American Tel. and Tel. Co., 552 F. Supp. 226 (D.D.C. 1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983), modified United States v. Western Elec. Co., 673 F. Supp. 525 (D.D.C. 1987), 714 F. Supp. 1 (D.D.C. 1988), affirmed in part and reversed in part 900 F.2d 283 (D.C.

Cir. 1990).

n82 See Bell Atlantic Order, 6 FCC Rcd at 3400, 3401 (Com. Car. Bur. 1991).

n83 We emphasize that where such services are used for the purpose of telephone solicitation in violation of our rules and the TCPA, the users of the services, not the carriers providing the services, would be held liable, consistent with Congress' policy that carriers not be held responsible for the content of messages transmitted through the network. See statement of Senator Hollings, Congressional Record, S 18785 (November 27, 1991). Of course, carriers initiating telephone solicitations on their own behalf using such service would be subject to our rules and the TCPA.

n84 Congressional Record, H 11310 (November 26, 1991).

n85 We emphasize that telephone solicitations as defined in our rules can never be classified as "emergencies." See § 64.1200(b).

n86 Commenters point out that the proposed rules, in the prohibition against line seizure, § 68.318, refer to "automatic dialing devices," a term not employed elsewhere in the rules or the TCPA. Reading § 227(d) as a whole, it is clear that the requirement refers only to automatic telephone dialing systems. The title and language of that section will thus be revised to read "automatic telephone dialing systems."

n88 See comments of SNET, Sprint, and reply comments of AT&T.

n89 Pacific Bell asserts that complaint proceedings brought under § 208 of the Communications Act, 47 U.S.C. § 208, and based on violations of § 227 of the Act, 47 U.S.C. § 227, could only be instituted against common carriers. Pacific Bell is correct with respect to complaints filed under Section 208 of the Act. In addition to the private right of action noted above, aggrieved persons or entities may report violations of the TCPA to the Commission and request action on such violations through the informal procedures set forth in Section 1.41 of the rules, 47 C.F.R. § 1.41. See, e.g., 47 U.S.C. §§ 312 and 503(b).

n90 See Section 2 of the TCPA.

APPENDIX A

Parties Filing Comments

Aberdeen American News
Alpha Information
Altoona Mirror
American Bankers Association (ABA)
American Civil Liberties Union
American Collectors Association * (ACA)
American Council of Life Insurance and the National Association of Life Underwriters
American Express Company * (AMEX)
American Financial Services Association * (AFSA)
American Newspaper Publishers Association * (Reply Comments by Newspaper Association of America)
American Resort Development Association
American Service Telemark
American Telemarketing Association, Inc. (ATA)
Ameritech Operating Companies * (Ameritech)

Amway
Ann Arbor News
Annenberg School for Communications
Argus Leader
Arizona Republic/Phoenix Gazette
Association of National Advertisers, Inc.
Asheville Citizen-Times
American Telephone and Telegraph Company * (AT&T)
Audio Technica
Avon
Baltimore Gas and Electric Company
Baltimore Sun
Banc One Corporation, California Bankers Clearing House Association, First USA Bank, New York Clearing House Association, QVC Network, VISA U.S.A., Inc. * (the Coalition)
Bell Atlantic
BellSouth *
Bellingham Herald
Bellville News-Democrat
Blue Cross & Blue Shield
Brazosport Facts
Brewster, Congressman Bill J. **
Buchan MD, Janet H. and Robert R. C.
Bucks County Courier Times (Mark Gursky)
Bucks County Courier Times (Arthur E. Mayhew)
California Department of Justice
California Public Utilities Commission
Capital Newspapers
Cellular Telecommunications Industry Association
Centel Corporation (Centel)
Center for the Study of Commercialism * (CSC)
Centre Daily Times
Chico Enterprise-Record

Citicorp *
Clark County Rural Electric Cooperative
CMS A/R Services
Coalition of Higher Education Assistance Organizations
ComCast Cellular **
Community Benefits Corporation
Conservation Fund
Consumer Action *
Consumer Bankers Association (CBA)
Contractors Clearing House
Courier-Journal
Cox Enterprises, Inc. (Cox)
CUC International, Inc.
CUNA Mutual Insurance Group
Daily News, Bowling Green, KY (Pipes Gaines)
Daily News, Lebanon, PA (Blake L. Sanderson)
Daily News, Los Angeles, CA (Kirk Felgenhauer)
Daily News, Los Angeles, CA (Lynne Hanchett)
Daily News, Los Angeles, CA (Chuck Schussman)
Detroit Newspaper Agency
Digital Systems International, Inc. *
Direct Marketing Association * (DMA)
Direct Selling Association
Electronic Information Systems, Inc.
Firelands Rural Electric Cooperative, Inc. **
Florida Today/USA Today
Forum
Franklinton Financial
Free Press Standard
Gadsden Times
Gannett Co., Inc. *
Gazette Printing Company
Gleaner
Goshen News
Grand Island Independent

Grand Rapids Press
Green Bay Press
GTE Service Corporation (GTE)
Guam Attorney General
Hartford Courant
Household International *
Huntsville Times
Idaho State Journal
Illinois Student Assistance Commission
Illinois, University of
Indianapolis Star, Indianapolis News
Independent Telecommunications Network, Inc. * (ITN)
Infiniti Group, Inc.
International Communications Association *
International Telesystems Corporation
InterVoice
Inventures
Investor's Business Daily
ITI Marketing Services, Inc.
Investment Company Institute
J. Blenkarn Systems
J. C. Penney Company, Inc
Jersey Journal
Johnstown Tribune Publishing Company
Jones Intercable **
Journal and Courier
Kalamazoo Gazette/Weekly Gazette, Hometown Gazette
Kauffman Group
King TeleServices
Knight Ridder, Inc.
La Crosse Tribune
Lansing State Journal
LCS Direct Marketing Services

Lee County Electric Cooperative, Inc.
Lejeune Associates of Florida * (Lejeune)
Mary Kay Cosmetics
MBNA America Bank, N.A.
MCI Telecommunications Corporation *
Merrill Lynch, Pierce, Fenner & Smith, Inc.
MessagePhone, Inc. *
Metrocall
Midland Daily News
Minnesota Attorney General
Mktg. Inc. **
Mobile Press Register
Montgomery Advertiser, Alabama Journal
Morning Call (Donald J. Belasco)
Morning Call (Richard E. Forgay II)
Mr. Fax *
Muskegon Chronicle
National Association of Realtors
National Association of Water Companies
National Consumers League (NCL)
National FaxList
National Retail Federation (NRF)
National Rural Electric Cooperative Association *
National Telephone Cooperative Association (NTCA)
NationsBank
New Haven Register
News and Observer
Newspaper Association of America ** (Initial Comment by American Newspaper Publishers Association)
New York Department of Public Service *
New York State Consumer Protection Board **
New York Times
Newsday
NonProfit Group **
North American Telecommunications Association

(NATA)
Norwest Card Services
Nynex Telephone Companies
Ohio Newspaper Association
Ohio Public Utilities Commission (OPUC)
Ohio Student Loan Commission
Olan Mills, Inc. *
Oregonian
Orlando Sentinel
Pacesetter Corporation
Pacific Bell, Nevada Bell * (Pacific Bell)
Palm Beach Post
Pennsylvania Newspaper Publishers' Association
Pueblo Chieftain
Pierce-Pepin Electric Cooperative
Pioneer Electric Cooperative
Pitney Bowes **
Plain Dealer
PNC Financial Corporation
Press Journal
Princeton Packet, Inc.
Privacy Times
Private Citizen, Inc. * (Private Citizen)
Public Forum **
Record Journal Publishing
Reese Brothers, Inc.
Review
RMH Telemarketing
Rochester Telephone Corporation
Rocky Mountain BankCard System
SafeCard Services, Inc. * (Safecard)
San Francisco Newspaper Agency
Santa Barbara News-Press
Santa Cruz, County of
Santa Monica, City of **

Scottsdale Progress
Sears, Roebuck and Co.
Securities Industry Association * (SIA)
Sentinel-Record
Shotten III, Bert K.
Southern New England Telephone Company * (SNET)
Southwestern Bell Telephone Company * (SWBT)
Spokesman-Review, Spokane Chronicle
Sprint *
Star-Ledger
Stockton Record
Student Loan Marketing Association *
Sun, The
Syracuse Herald-Journal, Post-Standard, Herald American
Tampa Tribune
Tandy Corporation **
Teknekron Infoswitch Corporation
Telecheck Services
Telegram & Gazette
Telemarketing Magazine **
Telocator, the Personal Communications Industry Association
Texarkana Gazette
Texas Public Utilities Commission *
Thomas Construction *
Thomasville Times-Enterprise
Time Warner Inc. *
Times-Picayune
Union-News, Sunday-Republican
Unisys
United Electric Cooperative, Inc.
United States Postal Service **
United States Telephone Association
United Student Aid Funds, Inc. **

U.S. Intelco Networks, Inc.
U.S. West Communications, Inc. (U.S. West)
USAA Federal Savings Bank
Utilities Telecommunications Council
Vanguard Cellular Systems, Inc.
Verde Independent
Vermont Public Service Board **
Victoria Advocate
Waco Tribune
Wachovia
Washington State Attorney General
Wells Fargo Bank
West Marketing Services
Western Express Service Company
Wisconsin, State of, Department of Justice
Worcester Telegram & Gazette
Zacson Corporation

* also filed reply comments

** filed only reply comments

APPENDIX B

Title 47 of the Code of Federal Regulations, parts 64 and 68, are amended as follows:

1. The table of contents for part 64 is amended by adding subpart L to read as follows:

Subpart L - Restrictions on Telephone Solicitation

§ 64.1200 Delivery restrictions.

2. The authority citation for subpart L is added to part

64 to read as follows:

Authority: 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218, and 227.

3. Subpart L is added to part 64 to read as follows:

Subpart L - Restrictions on Telephone Solicitation

§ 64.1200 Delivery Restrictions.

(a) No person may

(1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice,

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(2) Initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by § 64.1200(c).

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.

(4) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(b) For the purpose of § 64.1200(a) the term "emergency purposes" means calls made necessary in any situation affecting the health and safety of consumers.

(c) The term "telephone call" in § 64.1200(a)(2) shall not include a call or message by, or on behalf of, a caller:

(1) that is not made for a commercial purpose,

(2) that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,

(3) to any person with whom the caller has an established business relationship at the time the call is made, or

(4) which is a tax-exempt nonprofit organization.

(d) All artificial or prerecorded telephone messages delivered by an automatic telephone dialing system

shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player which placed the call) or address of such business, other entity, or individual.

(e) No person or entity shall initiate any telephone solicitation to a residential telephone subscriber (1) before the hour of 8 A.M. or after 9 P.M. (local time at the called party's location), and (2) unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(i) Written policy. Persons or entities making telephone solicitations must have a written policy, available upon demand, for maintaining a do-not-call list.

(ii) Training of personnel engaged in telephone solicitation. Personnel engaged in any aspect of telephone solicitation must be informed and trained in the existence and use of the do-not-call list.

(iii) Recording, disclosure of do-not-call requests. If a person or entity making a telephone solicitation (or on whose behalf a solicitation is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity

must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the solicitation is made will be liable for any failures to honor the do-not-call request. In order to protect the consumer's privacy, persons or entities must obtain a consumer's prior express consent to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a solicitation is made or an affiliated entity.

(iv) Identification of telephone solicitor. A person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. If a person or entity makes a solicitation using an artificial or prerecorded voice message transmitted by an autodialer, the person or entity must provide a telephone number other than that of the autodialer or prerecorded message player which placed the call.

(v) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(vi) Maintenance of do-not-call lists. A person or entity making telephone solicitations must maintain a do-not-call list for the purpose of any future telephone solicitations.

(f) As used in this section:

(1) The terms "automatic telephone dialing system" and "autodialer" mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(2) The term "telephone facsimile machine" means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (i) to any person with that person's prior express invitation or permission, (ii) to any person with whom the caller has an established business relationship, or (iii) by a tax-exempt nonprofit organization.

(4) The term "established business relationship" means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and

a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

4. The authority citation for subpart D of part 68 is revised to read as follows:

Authority: 47 U.S.C. §§ 151, 154, 155, 201-205, 218, 227, and 303.

5. Section 68.318(c) is amended by revising paragraph (c)(2) and adding paragraph (c)(3) to read as follows:

§ 68.318 Additional limitations.

* * *

(c) * * *

(2) Line seizure by automatic telephone dialing systems. Automatic telephone dialing systems which deliver a recorded message to the called party must release the called party's telephone line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other

calls.

(3) Telephone facsimile machines; identification of the sender of the message. It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. Telephone facsimile machines manufactured on and after December 20, 1992 must clearly mark such identifying information on each transmitted message.

Legal Topics:

For related research and practice materials, see the following legal topics:

Communications LawBroadcastingSponsorship IdentificationsCommunications LawPrivacyRadio CommunicationsCommunications LawPrivacyTelephone Consumer Protection Act

BARRETT

CONCUR:
September 17, 1992

STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (CC Docket No. 92-90).

This item adopts regulations to implement the prohibitions and technical requirements mandated by the Telephone Consumer Protection Act (TCPA) of 1991. This item also establishes regulations which allow consumers to avoid unwanted telephone solicitations through the placement on company specific do-not-call lists.

In crafting these provisions I was mindful of the need to strike a reasonable balance between privacy rights, public safety interests, and commercial freedoms of speech and trade, which Congress cited as a paramount concern in enacting the 1991 Act. I believe the proposed requirements balances the objectives of protecting customers from nuisance calls while permitting legitimate telemarketing practices.

In particular this item prohibits calls using autodialers or prerecorded messages to emergency and health care facilities. Prerecorded messages to residences would be prohibited. This Order also establishes mandatory guidelines for telemarketers regarding the maintenance of company specific do-not-call lists. These guidelines will require a written policy, training of customer representatives regarding do-not-call policy and procedures and other related requirements. I believe that the current record clearly supports the company-specific do-not call lists as the most effective, most easily implemented and the least costly of the methods proposed to curb unwanted telephone solicitations.

It is my expectations that the proposed rules will have a significant impact in curtailing intrusive nuisance calls by telemarketers. I will be monitoring these rules closely to make sure that they adequately protect consumers from unwanted calls.

28 USC § 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communication Commission made reviewable by section 402 (a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210 (e), 217a, and 499g (a) of title 7;

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101–56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114 (c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

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This copy of The Telephone Consumer Protection Act is provided by http://www.TCPALaw.com and is the version of the statute as it existed prior to amendment by the Junk Fax Prevention Act in 2005.

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TITLE 47--TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5--WIRE OR RADIO COMMUNICATION

SUBCHAPTER II--COMMON CARRIERS

Sec. 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section--

(1) The term ``automatic telephone dialing system'' means equipment which has the capacity--

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term ``telephone facsimile machine'' means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term ``telephone solicitation'' means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(4) The term ``unsolicited advertisement'' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States or any person outside the United States if the recipient is within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(i) to any emergency telephone line (including any ``911'' line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of his subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection,

subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement; and

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its

discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific ``do not call'' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall--

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under ubparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State--

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States–

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or

automatic telephone dialing system in a manner that does not

comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for

telephone facsimile machines to require that any such machine which is manufactured after one year after

December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph

(2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(f) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of

its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice mmediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so

intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for

violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) ``Attorney general'' defined

As used in this subsection, the term ``attorney general'' means the chief legal officer of a State.

(June 19, 1934, ch. 652, title II, Sec. 227, as added Dec. 20, 1991, Pub. L. 102-243, Sec. 3(a), 105 Stat. 2395; amended Oct. 28, 1992, Pub. L. 102-556, title IV, Sec. 402, 106 Stat. 4194; Oct. 25, 1994, Pub. L. 103-414, title III, Sec. 303(a)(11), (12), 108 Stat. 4294.)

Amendments

1994--Subsec. (b)(2)(C). Pub. L. 103-414, Sec. 303(a)(11), substituted ``paragraph'' for ``paragraphs''.

Subsec. (e)(2). Pub. L. 103-414, Sec. 303(a)(12), substituted ``national database'' for ``national datebase'' after ``such single''.

1992--Subsec. (b)(2)(C). Pub. L. 102-556 added subpar. (C).

Effective Date; Deadline for Regulations

Section 3(c) of Pub. L. 102-243, as amended by Pub. L. 102-556,
title I, Sec. 102, Oct. 28, 1992, 106 Stat. 4186, provided that:

``(1) Regulations.--The Federal Communications Commission shall prescribe regulations to implement the amendments made by this section [enacting this section and amending section 152 of this title] not later than 9 months after the date of enactment of this Act [Dec. 20, 1991].

``(2) Effective date.--The requirements of section 227 of the Communications Act of 1934 [this section] (as added by this section), other than the authority to prescribe regulations, shall take effect one year after the date of enactment of this Act [Dec. 20, 1991].''

Congressional Statement of Findings

Section 2 of Pub. L. 102-243 provided that: ``The Congress finds that:

``(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

``(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

``(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

``(4) Total United States sales generated through telemarketing amounted to $435,000,000,000 in 1990, a more than four-fold increase since 1984.

``(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an

emergency or medical assistance telephone line is seized, a risk to public safety.

"(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

"(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

"(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

"(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

"(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

"(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

"(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

"(13) While the evidence presented to the Congress indicates that automated or prerecorded calls

are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

``(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

``(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.''

Section Referred to in Other Sections

This section is referred to in section 152 of this title.

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Note: The phrase in (b)(2) "or any person outside the United States if the recipient is within the United States" was added by the 2003 CAN SPAM ACT and went into effect on Jan. 1, 2004.

47 USC § 402. Judicial review of Commission's orders and decisions

(a) **Procedure**

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

(b) **Right to appeal**

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(c) **Filing notice of appeal; contents; jurisdiction; temporary orders**

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) **Notice to interested parties; filing of record**

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28.

(e) **Intervention**

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) **Records and briefs**

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) **Time of hearing; procedure**

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of title 5.

(h) **Remand**

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out

the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) **Judgment for costs**

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) **Finality of decision; review by Supreme Court**

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.